

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914<sup>1915</sup>.

No. 498 161

E. B. JOHNSON, H. B. JOHNSON, AND FIRST NATIONAL  
BANK BUILDING COMPANY, PLAINTIFFS IN ERROR,

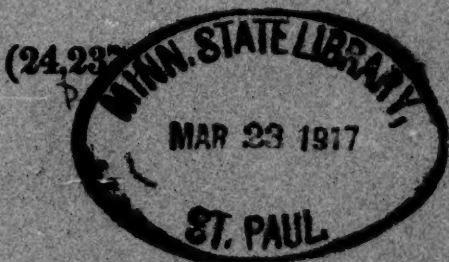
vs.

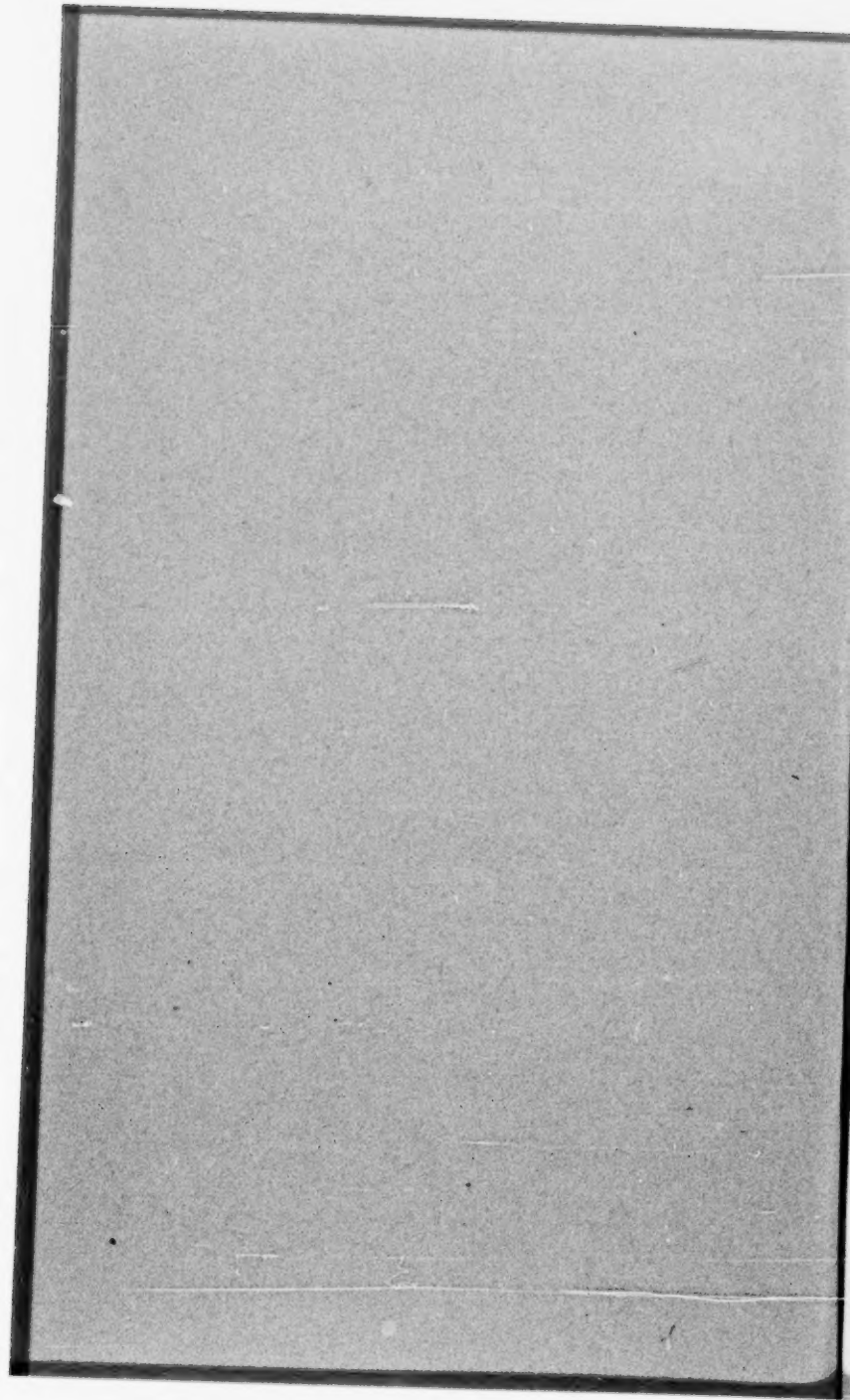
F. E. RIDDLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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FILED MAY 25, 1914.







(24,237)

SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1914.

No. 498.

E. B. JOHNSON, H. B. JOHNSON, AND FIRST NATIONAL  
BANK BUILDING COMPANY, PLAINTIFFS IN ERROR,

*v.*

F. E. RIDDLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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*a* In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. JOHNSON, H. B. JOHNSON, and FIRST NATIONAL BANK  
BUILDING COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Precipe for Record.*

To the Clerk of the Supreme Court:

Please furnish us with a copy of the following papers in said cause:

Citation in error and acceptance of service.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Supersedeas bond.

Petition in error and case-made.

Opinion filed in said cause as prepared by Honorable M. E. Rosser,  
Commissioner.

Order granting rehearing.

Opinion filed in said action by the Honorable Phil D. Brewer,  
Commissioner.

Petition for rehearing filed after the last named opinion.

Order overruling petition for rehearing.

Order affirming the judgment of the trial court.

BOND, MELTON & MELTON,

AMES, CHAMBERS, LOWE & RICHARDSON,

*Attorneys for Plaintiffs in Error.*

Endorsed: No. 1190. Supreme Court of Oklahoma. E. B. Johnson et al., Plaintiffs in Error, vs. F. E. Riddle, Defendants in Error. Precipe for Record. Filed April 21 1914. W. H. L. Campbell, Clerk.

*b* In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Clerk's Return to Writ of Error.*

In obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States, the duly

certified transcript of the record, the opinion and the proceedings of the within entitled cause, and all the things concerning the same.

In Witness Whereof I hereunto subscribe my name and affix the seal of the said Supreme Court of the State of Oklahoma this 20th day of May, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,  
*Clerk of the Supreme Court of Oklahoma,*  
By JESSIE PARDOE, *Deputy.*

1 Filed May 15, 1914. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error.

v.

F. E. RIDDLE, Defendant in Error.

*Citation.*

To the above named Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington District of Columbia, thirty days from and after this 14 day of May, 1914, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Oklahoma wherein you are defendant in error and E. B. and H. B. Johnson, and First National Bank Building Company are plaintiffs in error to show cause, if any there be why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable M. J. Kane, Chief Justice of the Supreme Court of Oklahoma, this 14 day of May, 1914.

M. J. KANE, *Chief Justice.*

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,  
*Clerk of the Supreme Court.*  
By JESSIE PARDOE, *Deputy.*

We hereby acknowledge due service of the within citation this 15 day of May, 1914.

A. C. CRUCE,  
W. A. LEDBETTER,  
*Attorneys for Defendant in Error.*



2 Filed May 15, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Petition for Writ of Error.*

E. B. Johnson and H. B. Johnson and First National Bank Building Company, the plaintiffs in error in the above entitled cause feeling aggrieved by the decision and judgment of the court rendered thereon on the 17th day of April, 1914, come now by Bond, Melton & Melton and Ames, Chambers, Lowe & Richardson, their attorneys of record herein, and petition the court for an order allowing said plaintiffs in error to prosecute a writ of error to the Honorable Supreme Court of the United States under and according to the rules of the United States in that behalf made and provided, and for an order that all further proceedings herein be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioners will ever pray.

BOND, MELTON & MELTON,

AMES, CHAMBERS, LOWE & RICHARDSON,

*Attorneys for Plaintiff in Error.*

3 Filed May 15, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States of America.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Assignment of Errors.*

Come now E. B. and H. B. Johnson and First National Bank Building Company, plaintiffs in error, in the above entitled cause, and say that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit:

1.

The Supreme Court of the State of Oklahoma committed error in affirming the judgment of the district court of Carter County enter-

ing judgment in said cause in favor of the defendant in error and against the plaintiffs in error.

## 2.

The Supreme Court of the State of Oklahoma committed error in holding that the Act of Congress of June 28, 1898, known as the Atoka Agreement permitted a tenant wrongfully holding possession against his landlord to take advantage of that possession to secure title as against his landlord.

## 3.

The Supreme Court of the State of Oklahoma committed error in denying the right and title set up and claimed by the plaintiffs in error under and by virtue of the Act of Congress of June 28, 1898, known as the Atoka Agreement.

## 4.

The Supreme Court of Oklahoma erred in holding that under the provisions of the Act of Congress approved June 28, 1898, known as the Atoka Agreement, it was the duty of the Townsite Commission to schedule town lots to the person who owned the improvements regardless of the question of former possession or previous holding or the nature or legality of such owner's possession.

## 5.

The Supreme Court of the State of Oklahoma committed error in denying to the plaintiffs in error the relief sought by their answer and cross-petition in said cause.

Wherefore the said plaintiffs in error pray that the judgment of the Supreme Court of the State of Oklahoma be reversed and that judgment be rendered for the plaintiffs in error as prayed in their answer and cross-petition.

BOND, MELTON & MELTON,

AMES, CHAMBERS, LOWE & RICHARDSON,

*Attorneys for Plaintiffs in Error.*

5 (Filed May 15, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Order Allowing Writ of Error.*

This cause coming on to be heard on the 20th day of April, 1914, upon petition of the plaintiffs in error for a writ of error herein,

and it appearing that the said plaintiffs in error have filed their assignment of errors, it is hereby ordered upon motion of Alger Melton and C. B. Ames, two of the attorneys for plaintiffs in error that a writ of error be and it is hereby allowed to have reviewed in the Supreme Court of the United States, the judgment heretofore rendered in said cause on April 17, 1914.

And it further appearing that said plaintiffs in error have prayed for an order of supersedeas in said cause, it is further ordered that said plaintiffs in error be required to execute their bond in said cause in the sum of \$10,000.00 and that upon the filing of said bond, and its approval by the Chief Justice of this court, it is ordered that all further proceedings be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Ordered, adjudged and decreed this 14<sup>th</sup> day of May, 1914.

[SEAL.]

M. J. KANE,  
*Chief Justice of the Supreme  
Court of Oklahoma.*

Attest:

W. H. L. CAMPBELL,

*Clerk of the Supreme Court of Oklahoma,*

By JESSIE PARDOE, *Deputy.*

Endorsed: No. 1190. Supreme Court of Oklahoma. E. B. and H. B. Johnson et al., Plaintiffs in Error, v. F. E. Riddle, Defendant in Error. Order allowing Writ of Error.

6 Filed May 15, 1914. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, 88:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you or some of you, by the highest court of law or equity of the said state in which a decision could be had in the said suit between E. B. and H. B. Johnson and First National Bank Building Company, plaintiffs in error, and F. E. Riddle, defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such statute, a manifest error has happened to the great damage of E. B. Johnson and H. B. Johnson and First National Bank Building Company, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this

writ so that you have the same at Washington on the 13th day of June, 1914, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14 day of May, 1914.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,

*Clerk of the District Court of the United States  
for the Western District of Oklahoma.*

Allowed by

M. J. KANE,

*Chief Justice of the Supreme  
Court of the State of Oklahoma.*

8 (Filed May 15, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Bond.*

Know all men by these presents that E. B. Johnson, H. B. Johnson and First National Bank Building Company, a corporation organized under the laws of Oklahoma, principal obligors, and T. T. Johnson and C. B. Campbell as sureties, are held and firmly bound unto F. E. Riddle, in the penal sum of Ten Thousand (\$10,000) Dollars, for the payment of which well and truly to be made, we and each of us do hereby jointly and severally bind ourselves, our successors and assigns.

Dated this 27th day of April, 1914.

The condition of the foregoing obligation is such that

Whereas said obligee did on April 17, 1914, in the above entitled cause, procure a judgment against the principal obligors affirming the previous decision of the District Court of Carter County, Oklahoma, ejecting the principal obligors from the real estate involved in said proceedings and denying the principal obligors the relief sought by them on their cross-petition in said cause; and

Whereas the said principal obligors have secured a writ of error to the Supreme Court of the United States to review the proceedings in said cause,

Now therefore, if the said principal obligors shall prosecute their writ of error to effect, and pay all damages and costs if they fail to make their plea good, then this obligation shall be void, otherwise to remain in full force and effect.

E. B. JOHNSON,  
H. B. JOHNSON,  
By BOND, MELTON & MELTON,  
*Their Att'ys.*  
FIRST NATIONAL BANK BUILDING  
COMPANY,  
By M. G. JOHNSON, *President,*  
*Principal Obligors.*  
T. T. JOHNSON,  
C. B. CAMPBELL, *Sureties.*

Attest:

INEZ SPRINGER McNEILL,  
Ne- INEZ SPRINGER,  
*Secretary.*

9 The above bond is hereby approved this 14 day of May,  
1914.

M. J. KANE,  
*Chief Justice of the Supreme  
Court of Oklahoma.*

Endorsed: No. 1190. Supreme Court of Oklahoma. E. B. and  
H. B. Johnson and First National Bank Building Company, Plain-  
tiffs in Error, v. F. E. Riddle, Defendant in Error. Bond.

10 (Filed Nov. 5, 1909. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma, at Guthrie.

No. 1190.

E. B. & H. E. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,  
vs.  
F. E. RIDDLE, Defendant in Error.

*Petition in Error.*

Now comes the plaintiffs in error, E. B. and H. B. Johnson and  
the First National Bank Building Company, a corporation, and  
represent to the Court that on the 11th day of June, 1909, the  
District Court of Carter County, in the State of Oklahoma, rendered  
a judgment, in cause No. 370, Styled F. E. Riddle vs. R. O. Bell  
et al., on the docket of said Court, against these plaintiffs in error  
for the title and possession of Lot Three (3) in Block Forty-six  
(46) in the City of Chickasha, in the State of Oklahoma, together

with all costs of suit, in favor of the defendant in error, F. E. Riddle.

That the said F. E. Riddle resides in the County of Grady, State of Oklahoma, and that his attorneys, Cruce, Cruce and Bleakmore, live in the County of Carter, State of Oklahoma, and that his attorney, W. A. Ledbetter, lives all over the State of Oklahoma.

That these petitioners were defendants in said cause, having been made so at the instance of the defendant in error.

That these petitioners feel themselves wronged and aggrieved by said judgment, and now in this Court, seek to reverse said Judgment, and have judgment rendered in this Court for themselves for the title and possession of said lot, and these petitioners herewith attach to this petition and make a part thereof, and mark Exhibit "A" assignments of errors, which were committed by the District Court of Carter County, Oklahoma, upon and in the trial of said Cause.

Petitioners also file herewith in this Court the Original case made and a certified copy of the same.

BOND & MELTEN,  
C. C. POTTER,  
*Att'ys for Plaintiffs in Error.*

12 (Filed Nov. 5, 1909. W. H. L. Campbell, Clerk.)

#### EXHIBIT "A."

In the Supreme Court of the State of Oklahoma, at Guthrie.

E. B. & H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

#### *Assignment of Errors.*

Now comes the plaintiffs in error, E. B. Johnson and H. B. Johnson and the First National Bank Building Company, and makes the following assignments of error committed by the District Court of Carter County, Oklahoma, upon the trial of Cause No. 370 in said Court, and styled F. E. Riddle et al., plaintiffs, vs. W. D. Bell et al., defendants.

1st. The Court erred in its finding of facts, in failing to find that J. P. Ellis was the tenant of Theodore Fitzpatrick.

2nd. The Court erred in failing to find that the said Ellis waived and abandoned his rights to remove the improvements from the lot in controversy, and thereby made them a part of the realty.

#### Exhibit "A."

13 3rd. The Court erred in failing to find that the title or ownership of the improvements was not involved in the suit for the possession of the property, brought by Fitzpatrick against



Ellis in the United States Court for the Southern District of the Indian Territory at Chickasha.

4th. The Court erred in finding that Fitzpatrick the plaintiff in said suit, by pleading, denied his ownership of the improvements on the lot, and conceded the ownership thereof in Ellis.

5th. The Court erred in finding that the judgment of the Court in said suit of Fitzpatrick against Ellis did not adjudge that the plaintiff was entitled to the possession of the improvements on the lot, and in finding that the ownership of the improvements was not concluded by the said judgment against the claims of Ellis.

6th. The Court erred in finding that the said Ellis continued to be the owner of the improvements after Fitzpatrick had obtained a judgment admitting him to possession of the same.

7th. The Court erred in finding that the ownership of the improvements on the lot in controversy were, in no manner, involved in the litigation between Fitzpatrick and Ellis, and that the ownership of the same was in no manner, adjudicated by the judgment of the Court in that case.

8th. The Court erred in failing to find that on the refusal of Ellis to remove the improvements from the lot, they became a part of it.

9th. The Court erred in finding that Bourland and Cross  
14 who then owned said lot, did not make any claim to the ownership of the improvements at the time the Townsite Commission were platting the town of Chickasha.

10th. The Court erred in attaching any importance to the fact that H. B. Johnson, one of the plaintiffs in error, herein, had made a contract with J. P. Ellis for an easement, (the use of a privy) on the lot in controversy, as such fact, if it be a fact, has not the remotest connection with or bearing upon the issues in this case.

11th. The Court erred in failing to give the judgment in the Unlawful Detainer case, in favor of Fitzpatrick against J. P. Ellis, full faith and credit, and in failing to find that such judgment was conclusive and binding on the parties, and not subject to attack by them or their privies, as to the relation of landlord and tenant, as to the unlawful holding-over of Ellis, and as to his denial and repudiation, not only of his tenancy, but of the title of a landlord.

12th. The Court erred in failing to find as a matter of law, that the said judgment established conclusively the right of Fitzpatrick and his privies to the possession of the lot together with all the improvements thereon.

13th. The Court erred, as a matter of law, in holding that the ownership of the said improvements on said lot, were not involved in the Unlawful Detainer case and were not concluded thereby in favor of Fitzpatrick and his privies, and against J. P. Ellis and his privies.

15 14th. The Court erred, as a matter of law, in holding that Fitzpatrick disclaimed ownership of the improvements on the lot by his pleadings in said Unlawful Detainer case.

15th. The Court erred, as a matter of law, in holding that J. P.

Ellis, by failing to remove the improvements from the lot, and by refusing to do so, and by setting up a right, in the Unlawful Detainer case, to keep his improvements on the lot, and by declaring his intention to let the ownership of the said improvements go with the right to the possession of the lot, had not thereby waived, abandoned and lost whatever ownership he had in and to said improvements, and whatever right he ever had to remove the same.

16th. The Court erred in holding, as a matter of law, that J. P. Ellis, was the owner of the improvements at the time the town of Chickasha was platted by the Townsite Commission.

17th. The Court erred, as a matter of law, in holding that a notice to the Townsite Commission, that the lot in controversy, was in litigation, was not a notice to the townsite commission that the ownership of the improvements was in dispute or litigation.

18th. The Court erred in holding that after the scheduling of the lot, as in litigation, the Townsite Commission had a right to schedule it to Riddle and Cook without notice to those, who had succeeded to Fitzpatrick's rights.

16 19th. The Court erred in finding that there was no fraud practiced upon the commission by Riddle and Cook in inducing the Commission to schedule the lot in controversy to them, after it had been scheduled as in litigation at the request of the vendors of these plaintiffs in error. As the Commission was induced to schedule it to Riddle and Cooke upon their representations that the ownership of the improvements was not in dispute, and was not in litigation, and that the improvements belonged to them, which was essentially, untrue.

20th. The Court erred in holding as a matter of law that the proper interpretation of the Curtis Act gave the owners of the improvements on a lot, the preference right to purchase the same as an improved lot without regard to the manner in which such owner obtained possession of said lot from his landlord, and without regard to the contractual rights existing between him and his landlord, and without regard to his legal obligations to his landlord.

21st. The Court erred in holding that under the Curtis Act, the owner of the improvements acquired the preference right to purchase the lot as against his landlord, though his possession of the lot was wrongful, though his having his improvements on the lot at the time, was wrongful and was in violation of law and the contract, thus rewarding a wrongdoer, by giving him the benefits and fruits of his wrongful acts, and punishing the landlord by entailing loss upon him, because the law was not powerful enough, and the action of the Court not expeditious enough to dispossess the wrongdoer before the time for the scheduling of the lot had arrived.

17 22nd. The Court erred in holding that the proper interpretation of the Curtis Act was to favor, uphold and reward lot jumpers and schemers, and those who violated their contracts and defied the Courts, instead of the man, who obeyed the law, kept his contracts, and appealed to the Court for protection.

23rd. The Court erred in holding that in the enforcement by

the Townsit- Commission of the Curtis Act no inquiry could be made as to the right to purchase, beyond the bare fact of the ownership of the improvements. That this fact once established, gives the preference right to purchase the lot to such owner, however wrongful he may have acquired the ownership, however unjust and inequitable it may be, the letter of the law must prevail over its spirit.

24th. The Court erred as a matter of law in holding that there was no trust relation arising out of the relation of landlord and tenant between Fitzpatrick and Ellis.

25th. The Court erred in holding that there was no element of fraud or wrong entering into the conduct of Ellis in reference to the lot, toward his landlord, Fitzpatrick, and in holding that the wrongful denial of Ellis, that he ever rented the lot from Fitzpatrick, or in any manner became his tenant, the wrongful denial of Ellis or Fitzpatrick's right to rent the land, Ellis's wrongful assertion that he had a superior right to the possession of the lot over Fitzpatrick, his ultimate use of that possession, to entirely defeat and destroy the rights of his landlord, are not in the eyes of the Law, fraudulent or in violation of his trust relation.

18 26th. The Court erred in not holding that whatever rights to the lot Ellis acquired by reason of his possession obtained and held under Fitzpatrick, did not enure to the benefit of Fitzpatrick, and were held by Ellis in trust for him and his privies.

27th. The Court erred in holding that whatever rights Riddle obtained by reason of the issuance of the patent or deed to him to this lot, was not under the circumstances, held by him in trust for the defendants.

28th. The Court erred in practically holding that the law of trust relations heretofore and everywhere arising between landlord and tenants, does not apply to landlord and tenant, as that relation exists in the Indian Territory.

29th. The Court erred in rendering judgment for the defendant in error, Riddle, for the title and possession of the lot.

30th. The Court erred in failing to render judgment for these defendants in error on their cross-bill for the title and possession of said lot, and adjudging F. E. Riddle, to hold the legal title to said lot in trust for these petitioners.

31st. The Court erred in overruling petitioners' motion for a new trial.

BOND & MELTON,  
C. C. POTTER,  
*Att'ys for Pl't'ff- in Error.*

Endorsed: In the Supreme Court of the State of Oklahoma, at Guthrie. E. B. & H. E. Johnson, and First National Bank Building Company, Plaintiffs in Error vs. F. E. Riddle, Defendant in Error. Petition in Error.

12

E. B. JOHNSON ET AL. VS. F. E. RIDDLE.

19

(Copy.)

#1190.

Filed Nov. 5, 1909. W. H. L. Campbell, Clerk.

No. 370.

F. E. RIDDLE et al., Plaintiffs,  
vs.

W. D. BELL et al., Defendants.

*Case-made.*

Appearances:

A. C. Cruce, W. A. Ledbetter, F. E. Riddle, for Plaintiffs.  
Bond & Melton, Judge C. C. Potter, for Defendants.

Before Hon. Stillwell H. Russell, Judge.

Filed in open court. Oct. 18, 1909. At — o'clock — m. C. T.  
Vernon, Clerk District Court Carter County, Oklahoma.

20 In the District Court of Carter County, State of Oklahoma.

No. 370.

F. E. RIDDLE, MATT COOK, et al., Plaintiffs,

vs.

W. D. BELL, THOS. SINCLAIR, THEO. FITZPATRICK, et al., De-  
fendants.

*Case-made.*

Appearances:

F. E. Riddle, W. A. Ledbetter, A. C. Cruce, for Plaintiffs.  
Bond & Melton, C. C. Potter, for Defendants.

Before Hon. Stillwell H. Russell, Judge.

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23 In the District Court of Carter County, State of Oklahoma.

No. 370.

F. E. RIDDLE, MATT COOK, et al., Plaintiffs,

vs.

W. D. BELL, THOS. SINCLAIR, THEO. FITZPATRICK, et al., Defendants.

*Case-made.*

Be it remembered, That the plaintiffs, F. E. Riddle, Matt Cook and others, began this suit against the defendants, W. D. Bell, Thos. Sinclair, Theo. Fitzpatrick and others, on the 3d day of February,



1903, by filing in the office of the Clerk of the United States Court within and for the Southern District of the Indian Territory, at Chickasha, their Complaint at law, which is in the words and figures following, towit:

*Original Complaint at Law.*

In the United States Court within and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et als., Plaintiffs,

vs.

W. D. BELL et als., Defendants.

*Complaint at Law.*

24 Come now the plaintiffs, F. E. Riddle and Matt Cook and represent to the court that they are United States citizens and residents of the Southern District, Indian Territory, and that the defendants herein, W. D. Bell, Thos. Sinclair, Jas. Reichif and Theo. Fitzpatrick are residents of the Southern District and reside nearer Chickasha than any other place of holding court in said district and are all United States citizens.

First. For cause of action plaintiffs state that they are the legal owners of and entitled to the immediate possession of Lot No. 3 in Block No. 46 as per the official plat of the City of Chickasha, I. T. and situated on the south side of Chickasha Avenue, and being 25 feet in width by 165 feet in length. That said lot was by the Town-site Commission scheduled and appraised to said plaintiffs and notice thereof, on the 12th day of June, 1902, was served on them. (A copy of said notice is hereto attached, marked Exhibit A and made a part of this complaint.) That afterwards, towit, on the — day of June, 1902, plaintiffs forwarded to J. Blair Shoenfelt, U. S. Indian Agent at Muskogee, I. T. who was authorized by law to receive the same, the sum of \$375.00 in full payment, the same being 62½% of the appraisement of said lot. That on the 28th day of June, 1902, the said J. Blair Shoenfelt, as such Indian Agent, issued his receipt of said payment, which receipt is in figures and words as follows, towit:

25 "Finis E. Riddle, Matt Cook, Chickasha, I. T. Sirs: I acknowledge receipt of your remittance of \$375.00, the same being the full payment on Lot 3, Block 46, in the town of Chickasha, Indian Territory, as per the statements accompanying remittance. Very respectfully, J. Blair Shoenfelt, U. S. Agent." (A copy of same is hereto attached and marked Exhibit B and made a part hereof.)

Second. That on the 28th day of June, 1898, and for several weeks prior thereto, and ever since said date, plaintiffs were the legal and absolute owners of substantial, lasting and permanent improvements situated upon said lot, and by virtue of being the owners of said improvements under the law they were entitled to

have said lot scheduled and appraised to them, and had the absolute, sole and undisputable right to purchase said lot from the Government through its legal and authorized commission, known as the "Townsite Commission for the Chickasaw Nation," and plaintiffs are now the legal, sole and absolute owners of said lot and all improvements situated upon said lot, which are lasting, substantial and permanent.

Third. Plaintiffs state that on the — day of January, 1903, said defendants, W. D. Bell, and Thos. Sinclair and Jas. Reichif wrongfully and unlawfully repudiated their contract with plaintiff- and entered into possession of said lot under their co-defendant, Theo. Fitzpatrick, and are now wrongfully and unlawfully holding possession of same, against plaintiffs' consent, and refuse to vacate same.

Fourth. That the reasonable rental value of said lot and improvements thereon situated is \$37.50 per month; which amount  
26 plaintiffs sue for and that said lot is of the value of \$5,000.00.

Wherefore, plaintiffs pray that the defendants be cited to appear and answer herein and that on final hearing said plaintiffs have judgment against said defendants and each of them for the possession and title to said lot and that plaintiffs be adjudged the absolute owners of said lot and that title be quieted in them and that they also have their rents, at the rate of \$37.50 per month, together with all their costs, and pray for such other general and special relief as they may be entitled to in the premises.

A. C. CRUCE &  
W. A. LEDBETTER,  
BAILEY & VENABLE,  
F. E. RIDDLE,

*Attorneys for Plaintiffs.*

INDIAN TERRITORY,  
*Southern District, ss:*

Personally appeared before me the undersigned authority, F. E. Riddle, who on oath states that he is one of plaintiffs in the above entitled cause, and that the facts and statements contained herein are true to the best of his knowledge and belief.

F. E. RIDDLE.

Subscribed and sworn to before me this the 2d day of Febr'y,  
A. D. 1903.

[SEAL.]

C. M. CAMPBELL, *Clerk,*  
By J. W. SPEAKE, *Deputy.*

27 EXHIBIT A (Attached to Complaint).

Department of the Interior,  
United States Indian Service.

Townsite Commission for the Chickasaw Nation, Indian Territory,  
Chickasha, I. T.

To Finis E. Riddle, Matt Cook:

You are hereby notified that this commission has appraised and scheduled to you improved property in the town of Chickasha, Chickasaw Nation, Indian Territory, as follows:

Lot No. 3, Block No. 46, Amount of Appraisement, \$600.00, Per Cent, 62½.

Under the provisions of the agreement with the Choctaw and Chickasaw Nations, as ratified by the act of Congress, approved June 28, 1898, (30 Stat. 495) you have the right to purchase the above described lots in the town named at the proper per cent of the appraised value as indicated.

The first payment of one-fourth of the purchase price of 25 per centum of the amount due for each lot, must be made within sixty days from the date of the service of this notice, and the remainder of the purchase money in three annual equal installments.

All such payments must be made to the United States Indian Agent, Union Agent, at Muskogee, Indian Territory.

If said first payment of 25 per centum is not made with- sixty  
28 days from the date of service of this notice, the property  
will be subject to sale at public auction to the highest bidder.

ARTHUR W. HEFLEY,  
WESLEY B. BURNEY,  
*Townsite Commission.*

*Acknowledgment of Service.*

Service of the above notice is hereby acknowledged at Chickasha, Indian Territory, this 12th day of June, 1902, at 8 o'clock, A. M.

FINIS E. RIDDLE &  
MATT COOK.

BERY C. L. JOHNSON, *Witness.*

## EXHIBIT B (Attached to Complaint).

Department of the Interior,  
United States Indian Service.

Office of the United States Indian Agent,  
Union Agency.

MUSKOGEE, INDIAN TERRITORY, June 28, '02.

Finis E. Riddle, Matt Cook, Chickasha, I. T.

SIRS: I acknowledge receipt of your remittance of \$375.00 the same being the full payment on lot 3 in Block 46, in the town of Chickasha, Indian Territory, as per the statement accompanying remittance.

Very respectfully,

J. BLAIR SHOENFELT,  
U. S. Indian Agent.

29 And on the back of said Complaint at Law appear the following endorsements (omitting the title of the cause):  
Filed Feb. 2, 1903, C. M. Campbell, Clerk. Filed Mar. 6, 1909, C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

*Answer of Defendants W. D. Bell, Thos. Sinclair, and Jos. Richif.*

In the United States Court for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Answer of the Defendants W. D. Bell, Thomas Sinclair, and Jas. Richif.

Now come the defendants, W. D. Bell, Thomas Sinclair, and Joe Richif, and for answer herein say:

That they do not know who is the rightful owner of the property sued for. They admit that they are in possession of the same, but they deny that they wrongfully and unlawfully repudiated any contract that they had with the plaintiffs; but they allege that R.

30 M. Bourland and Mrs. Ella Cross were placed in possession of said property by the United States Marshal for this District by virtue of a writ of possession issued out of this court in the case of Theodore Fitzpatrick vs. — Ellis; and that said United States Marshal, by virtue of the same process ejected and dispossessed the plaintiffs from whatever possession they had theretofore held of said property, and that after the plaintiffs were dispossessed by said Marshal, by virtue of said process, and the said

Bourland and the said Cross placed in peaceable possession thereof by said Marshal, these defendants rented the same from the said Bourland and said Cross, and now hold the same as their tenants.

These defendants further show that they are not familiar with the merits of the controversy between the plaintiffs and the said Bourland and Cross in reference to said property, and can therefore not make the defense of the said Bourland and Cross, if they have any, against the plaintiffs.

Wherefore, they pray that the said R. M. Bourland and the said Mrs. Ella Cross, be made parties to this suit, as their rights are involved and cannot otherwise be protected, in order that they may have an opportunity to defend against this action.

JOSEPH RECHIF.  
W. D. BELL.

Sworn to and subscribed before me this 18 day of Feby.,  
31 1903, by W. D. Bell.

J. T. ANST,  
*Notary Public.*

I, ———, do on oath state that the statements contained in the above and foregoing answer are true.

Subscribed and sworn to before me this 18th day of February,  
A. D. 1903.

On the back of said answer of defendants W. D. Bell, Thos. Sinclare and James Rechif appears the following endorsement (omitting title of cause): Filed in open court, Feb. 18, 1903, C. M. Campbell, Clerk. Filed Mar. 6, 1909, C. T. Vernon, Clerk Dist. Court, Carter County.

And on the same day, to-wit, the 18th day of February, 1903, the defendant, Theodore Fitzpatrick, filed in said Court his answer to the complaint of plaintiffs, which said answer is in the words and figures following, to-wit:

*Answer of Defendant Theodore Fitzpatrick.*

In the United States Court for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,  
vs.  
W. D. BELL et al., Defendants.

Answer of the Defendant Theodore Fitzpatrick.

Now comes the defendant, Theodore Fitzpatrick, in the above cause and says that he has no interest whatever in

the matters in controversy in this suit; that he does not have any interest in and to the property sued for herein; and he further shows that on the 8th day of April, A. D. 1899, he and his wife, Maria Fitzpatrick, sold all the interest they ever had in and to the above property sued for herein to Mrs. Ella Cross, and since then they have never claimed or asserted any interest to the said property.

Wherefore, they pray that they be discharged with their cost.

*Attorneys for Defendants.*

I, Theodore Fitzpatrick, do on oath state that the statements contained in the above and foregoing answer are true.

THEO. FITZPATRICK.

Subscribed and sworn to before me this 18th day of February, A. D. 1903.

E. HAMILTON,  
*Notary Public.*

And on the back of said answer of defendant Theo. Fitzpatrick appears the following endorsement (omitting title of cause): Filed in open court, Feb. 18, 1903. C. M. Campbell, Clerk. Filed Mar. 6, 1909, C. T. Vernon, Clerk Dist. Court, Carter Co.

33        On the 18th day of February, 1903, R. M. Bourland and Mrs. Ella Cross, filed in said court their Motion to be made parties defendant in said cause, which said motion is in the words and figures following, to-wit:

In the United States Court for the Southern District of the Indian Territory.

F. E. RIDDLE et al., Plaintiffs,  
vs.  
W. D. BELL et al., Defendants.

*Motion.*

Now come R. M. Bourland and Mrs. Ella Cross and move the Court that they be permitted to make themselves parties defendant herein.

They show that they are the rightful owners of said property, and that the defendants W. D. Bell, Thomas Sinclair and James Rechif are their tenants, holding said property for them, and that it is necessary, for the protection of the interests of these defendants, that they be made parties hereto; and the said R. M. Bourland and Mrs. Ella Cross say that they herewith tender their answer in this cause, and they refer to the same to show the grounds of their right.

M. M. BEAVER,  
POTTER, BAREFOOT & CRAMICHAEL,  
*Attorneys for Defendants.*



34 And on the back of said motion appears the following endorsement: Filed in open court. Feb. 18, 1903. C. M. Campbell, Clerk.

And afterwards, towit, on said 18th day of February, 1903, defendants R. M. Bourland and Mrs. Ella Cross filed in said court their Answer to the Complaint of plaintiffs, in the words and figures following, towit:

*Answer of R. M. Bourland and Ella Cross.*

In the United States Court for the Southern District of the Indian Territory.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now come R. M. Bourland and Mrs. Ella Cross, who have been permitted by the Court to make themselves defendants herein, and for answer to the plaintiffs' complaint herein they say:

That plaintiffs are not the legal owners and entitled to the immediate possession of the property and lot described in plaintiff's complaint; that plaintiffs have not been injured by the defendants herein, as alleged by them in their complaint, nor did the defendants, or any of them, wrongfully repudiate any rental contract which they had with the plaintiffs in reference to said lot, nor are the plaintiffs entitled to recover the rental value of said property.

35 These defendants further show that they are the legal owners of said property, and are in the lawful possession of the same; and they further show that on or about the 7th day of July 1898, the defendant, Theodore Fitzpatrick, being then the owner of said property and entitled to the immediate possession of the same, instituted a suit in this court to recover the same from one J. P. Ellis, and to recover rent for the wrongful detention of the same; that said action was an action of unlawful detainer, in which it was claimed by the plaintiff that the defendant was unlawfully holding over after the expiration of his rental contract; and on the 10th day of Oct., 1909, this court rendered a judgment upon the verdict of a jury in favor of the said Theodore Fitzpatrick and against the said J. P. Ellis, adjudging the said property to be the property of the said Theodore Fitzpatrick and not the property of the said J. P. Ellis; that said J. P. Ellis prosecuted an appeal in said cause to the Court of Appeals of the Indian Territory, which court did on the 4th day of October, 1901, affirm the judgment and decision of this court in said case, but that the said J. P. Ellis did thereafter prosecute an appeal on writ of error from the said Court of Appeals to the United States Circuit Court of Appeals, for the Eighth Circuit at St. Louis, which Court did on the — day of —, 1902, duly affirm the said judgment and decision of the Court of Appeals of the Indian Territory and of this honorable Court.

36 That while said case was pending on appeal in the Court of Appeals for the Indian Territory, and on the 8th day of April, 1899, the said Theodore Fitzpatrick, joined by his wife, Maria Fitzpatrick, did bargain, sell and convey all his interest in said lot and property described in plaintiffs' complaint to Mrs. Ella Cross a copy of which transfer is hereto attached and marked Exhibit A and made a part of this answer.

That thereafter and on the 18th day of September, 1900, the said Mrs. Ella Cross, joined by her husband, J. E. Cross, bargained, soled and conveyed to the defendant R. M. Bourland, an undivided one-half ( $\frac{1}{2}$ ) interest in and to said property, a copy of which transfer is hereto attached, Marked Exhibit B and made a part of this answer, whereby these defendants became jointly the rightful owners of all the right, interest and claim of the said Theodore Fitzpatrick in and to said property, as the same existed before the said legal proceedings against J. P. Ellis, and such as might accrue to him by virtue of said legal proceedings.

That said various judgments and decrees of the court adjudged said Theodore Fitzpatrick to be the rightful and lawful owner, as against the said J. P. Ellis, of all the property in controversy, including the title to the lot, the right to the possession of the lot and the improvements thereon.

That the defendant, F. E. Riddle was one of the attorneys for the defendant J. P. Ellis in all of the foregoing legal proceedings, and represented him therein; that pending said litigation the said F. E. Riddle procured the said J. P. Ellis, as defendants are informed, to make to him and his co-plaintiff a transfer of his interest in and to said property, which is the only title, claim or right which the said plaintiffs have, or ever had, in and to said property.

These defendants further show that when the Townsite Commission came to plat, lay off and schedule the town of Chickasha, the case of Fitzpatrick vs. Ellis, before alluded to, was pending in the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, as above set forth, and said lot was then in litigation by reason thereof; that when the said Townsite Commission came to plat and schedule the lot in controversy, they first scheduled the same as "in litigation"; that defendants, knowing that said lot should be scheduled as in litigation, and not scheduled to either party, never requested that it be scheduled to them, but they examined into the disposition the townsite commission was making of the same and found that they had properly scheduled the same as in litigation, thereby protecting the rights of all the litigants, and giving neither one an advantage. This action of the commission was entirely satisfactory to these defendants, and they gave the matter no more attention; but the defendants show that thereafter the plaintiffs wrongfully seeking an advantage of these defendants, by some means unknown to these defendants, prevailed upon the townsite commission to erase their former schedule, and to schedule the same to the plaintiffs, which was a mistake and error on the part of the commission, and was in fraud of the rights of these defendants, and was brought about and induced by the plaintiffs.

That plaintiffs, in great haste to consummate their fraudulent scheme to cheat and defraud these defendants out of their title to said property, sent the purchase money for the payment of said lot to the United States Indian Agent for the Indian Territory, who, not knowing of the fraudulent schemes and purposes of the plaintiffs, accepted the same, but before patent was issued to the plaintiffs these defendants found out and ascertained that the scheduling of said lot had been changed without their consent or knowledge, protested against the issuance of said patent and notified the said Indian Agent of all the facts herein alleged, and asked that said patent be not issued until the rights of the parties thereto could be investigated and determined; that said Indian Agent, in obedience to said protest, has withheld and is still withholding the patent upon said land. Defendants allege that the plaintiffs acquired no right in and to said property, by reason of their wrongful and fraudulent acts aforesaid, but that these defendants are the rightful owners to said property, and they pray that they be adjudged by this Honorable Court to be such, and that they be discharged with their cost.

M. M. BEAVERS &  
POTTER, BAREFOOT & CARMICHAEL,  
*Att'ys for Defendants.*

39 I. R. M. Bourland, do on oath state that the statements contained in the above and foregoing answer are true.  
R. M. BOURLAND.

Subscribed and sworn to before me this 18th day of February, A. D. 1903.

V. M. CAMPBELL, *Clerk*,  
By J. W. SPEAKE, *Deputy*.

And on the back of said answer of R. M. Bourland and Mrs. Ella Cross, appears the following endorsement: Filed in open court. Feb. 18, 1903. C. N. Campbell, Clerk.

*Journal Entry.*

In the United States Court within and for the Southern District of Indian Territory, at Chickasha, 3d Day February Term, 1903, Feb'y 18th, 1903.

F. E. RIDDLE et al., Plaintiffs,  
vs.  
W. D. BELL et al., Defendants.

40 Now at this time came on to be heard the motion of R. M. Bourland and Mrs. Ella Cross to be allowed to make themselves parties defendant herein, and said motion being duly considered and understood by the court the same is granted and the said R. M. Bourland and Mrs. Ella Cross are permitted to make themselves parties defendant and allowed to defend against the

action of the plaintiffs the same as if they had been made parties defendant originally.

*Plaintiffs' First Amended Complaint.*

And afterwards, towit, on the 12th day of December, 1905, plaintiffs filed in said court their Amended Complaint, which said amended complaint is in the words and figures following, towit:

In the United States Court within and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Come now the plaintiffs, F. E. Riddle and Matt Cook and represent to the court that they are United States citizens and residents of the Southern District, Indian Territory, and that the defendants herein, W. D. Bell, Thomas Sinclair and Jas. Recheif and Theo. Fitzpatrick are residents of the Southern District, and reside nearer Chickasha than any other place of holding court in said district, and are all United States citizens.

41 First. For cause of action plaintiffs state that they are the legal owners of and entitled to the immediate possession of Lot #3 in Block #46 as per the official plat of the City of Chickasha, I. T., and situated on the south side of Chickasha Avenue, and being 25 feet in width by 165 feet in length. That said lot was by the Townsite Commission scheduled and appraised to said plaintiffs and notice thereof, on the 12th day of June, 1902, was served on them. (A copy of said notice is hereto attached, marked Exhibit A, and made a part of this complaint.) That afterwards, to-wit: on the — day of June, 1902, plaintiffs forwarded to J. Blair Shoenfelt, U. S. Indian Agent at Muskogee, I. T., who was authorized by law to receive the same the sum of \$375.00 in full payment, the same being 62½ per cent of the appraisement of said lot. That on the 28th day of June, 1902, the said J. Blair Shoenfelt, as such Indian Agent, issued his receipt for said payment, which receipt is in figures and words as follows, towit:

"Finis E. Riddle, Matt Cook, Chickasha, I. T. I acknowledge receipt of your remittance of \$375.00, the same being the full payment of Lot 3 Block 46, in the town of Chickasha, Indian Territory, as per the statements accompanying remittance. Very respectfully, J. Blair Shoenfelt, U. S. Indian Agent." (A copy of same is hereto attached and marked Exhibit B and made a part hereof.)

Second. That on the 28th day of June, 1898, and for several weeks prior thereto and ever since said date, plaintiffs were  
42 the legal and absolute owners of substantial lasting and permanent improvements situated upon said lot, and by virtue of being the owners of said improvements, under the law were entitled to have said lot scheduled and appraised to them, and had the

absolute, sole and indisputable right to purchase said lot from the Government and the Choctaw and Chickasaw Nations, through their legal and authorized commission, known as the Townsite Commission for the Chickasaw Nation, and plaintiffs are now the legal, sole and absolute owners of said lot and all improvements situated upon said lot, which are lasting, substantial and permanent.

Third. Plaintiffs state that on the — day of January, 1903, said defendants, W. D. Bell, Thomas Sinclair, and James Recheif, who were occupying said lot and premises under plaintiffs, wrongfully and unlawfully repudiated their contract and entered into possession and attorned to the defendant Theo. Fitzpatrick, and are now wrongfully and unlawfully holding possession of said lot against plaintiff's consent and refuses to vacate the same.

Fourth. That the reasonable rental value of said lot and improvements thereon situated is \$125.00 per month; which amount plaintiffs sue for and that said lot is of the value of \$5,000.00.

Fifth. Plaintiffs state that on the 15th day of July, 1902, the said defendants herein filed their petition or bill in equity in this court, wherein plaintiffs herein and J. P. Ellis, D. H. Johnson and  
43 G. W. Dukes and J. Blair Shoenfelt, U. S. Agent, were defendants, on to the equity side of the docket of said court, Numbered Cause 694, R. M. Bourland et al. vs. D. H. Johnson et al., said bill in equity in words and figures following, omitting the caption, towit:

"The plaintiffs, R. M. Bourland and J. E. Cross complaining of the above named defendants, for cause of action say:

"That on the — day of February, 1899, Theodore Fitzpatrick filed his complaint in the United States Court for the Southern District of the Indian Territory, at Chickasaw, against J. P. Ellis, claiming the possession of Lot three (3), in Block forty-six (46) as shown by the original plat of the town of Chickasha. That at the October 1900 term of said court said cause was tried by a jury, a verdict rendered for the plaintiff and judgment rendered for the possession of said property, as shown on page II of the transcript of said cause herewith filed and made a part of this complaint.

"That on the 4th day of February, 1901, the said J. P. Ellis filed his appeal in the United States Court of Appeals for the Indian Territory, and that said cause was submitted at the — term 1901.

That at the — term, 1901 of the United States Court of Appeals an opinion was rendered in said cause in which opinion the judgment of the United States Court for the Southern District  
44 of the Indian Territory was affirmed.

That thereafter the said J. P. Ellis took an appeal from the judgment of the United States Court of Appeals for the Indian Territory to the United States Court of Appeals of the Eighth Circuit, and that said cause is in that court still pending.

That on the — day of —, 1899, said Theodore Fitzpatrick for a valuable consideration executed to the plaintiff, J. E. Cross, his quit claim deed for said property, and afterwards the plaintiff, R. M. Bourland, bought from said Cross an undivided one-half interest in said property, and that plaintiffs are the sole owners of the same.

That some time in the month of —, 1902, all the lots in the City of Chickasha were scheduled under the direction of Arthur W. Hefley and Wesley B. Burney, Townsite Commissioners for the Chickasaw Nation, and that after said town lots had been so scheduled the records of said townsite commissioners showed that said lot 3 in Block 46 had been scheduled as "in litigation."

That the part of said record showing that said lot was in litigation was afterwards abstracted from said record, and that the defendants F. E. Riddle and Matt Cook fraudulently procured said townsite commissioners to schedule and list said town lot to them. That the

45 defendant F. E. Riddle is and has always been the attorney of the defendant J. P. Ellis in the litigation affecting the property herein described.

That said defendants F. E. Riddle and Matt Cook immediately after the commission of said fraud, forwarded to the defendant J. Blair Shoenfelt, the full appraised value of said lot, less the reduction allowed by law, and demanded that he procure a deed from the defendants, D. H. Johnson, G. W. Dukes, or the person authorized by the Choctaw and Chickasaw tribes to execute and deliver to the purchasers of town lots deeds to such lots, and that he return the same to them.

That said property is now in the hands of the defendants, J. P. Ellis, Matt Cook and F. E. Riddle, who are the real defendants in interest and all of whom are wholly and totally insolvent.

That unless an injunction be granted them, great and irreparable injury will result to plaintiffs.

That defendants J. P. Ellis, Matt Cook and F. E. Riddle continuously keep said property in litigation for no other purpose than to derive the rent from the same. Wherefore plaintiffs pray that the said defendants, D. H. Johnson, Governor of the Chickasaw Nation, G. W. Dukes, Principal Chief of the Choctaw Nation, the person or persons authorized by the Choctaw Nation to execute and deliver deeds to the purchasers of town lots in the Choctaw and Chickasaw Nations, and J. Blair Shoenfelt, United States Indian Agent,

46 be enjoined from executing or delivering to the defendants, J. P. Ellis, Matt Cook and F. E. Riddle, or their agents any deed or transfer of said town lot, and that said defendants, J. P. Ellis, Mat Cook and F. E. Riddle, be enjoined from receiving the same and from transferring by deed or otherwise said property to any other person; and the plaintiffs further pray that a receiver be appointed to take charge of said property pending this and all other litigation affecting said property in which the parties herein are concerned, and for other relief.

BEAVERS, SAYER & BEAVERS,  
*Attorneys for Plaintiffs."*

Plaintiffs further state that on the 29th day of September, 1902, being one of the regular days of the September, 1902 Term of Court in Chickasha, they filed their general demurrer and answer to the petition in Cause No. 694, which said demurrer is in the words and figures following, towit: omitting the caption:

"Come now the defendants Matt Cook, J. P. Ellis and F. E. Riddle above named, and file their demurrer to plaintiffs' petition filed herein, and for such demurrer, allege:

That said complaint is insufficient in law to entitle the plaintiffs to the relief sought and prayed for, or to constitute any cause of action against the defendants.

Wherefore, they pray the judgment of the Court.

47

A. C. CRUCE,

F. E. RIDDLE,

*Attorneys for Defendants.*

That on, to wit, the 3d day of October, 1902, being one of the regular days of the October term of court at Chickasha, said demurrer came on to be heard by the court and the same was by the court sustained and judgment duly given and made and the defendants were given until the next day to amend. Plaintiffs further state that said defendants failed to file any amended complaint or pleading in said cause, and that on, to wit, the 19th day of February, 1903, said cause was by the court dismissed, as hereinafter more fully alleged. That said answer is in words and figures, with indorsements thereon, as follows:

"Come now the defendants, F. E. Riddle, Matt Cook and J. P. Ellis and for answer to plaintiffs' petition in equity filed herein state:

First. That they admit that Theo. Fitzpatrick in 1899 filed his complaint in the U. S. Court in unlawful detainer for Lot #3 in Block #46, as shown by the original plat of the town of Chickasha and at the October term thereof judgment was rendered in favor of said plaintiff for possession of said lot.

Second. Defendants admit that thereafter said defendant J. P. Ellis appealed said case to the Court of Appeals for the Indian Territory, and his said cause was submitted at the — term thereof, and that on the — day of October, 1901, an opinion was rendered in said cause, in which opinion the U. S. Court for the  
48 Southern District of the Indian Territory was affirmed.

Third. Defendants admit that said J. P. Ellis prosecuted his appeal or writ of error to the Circuit Court of Appeals for the 8th Circuit, at St. Louis, and that said cause is now pending in said court.

Fourth. Defendants admit that said Theo. Fitzpatrick on the — day of April, 1899, executed a certain quitclaim deed of his interest in said lot to J. E. Cross and the said J. E. Cross executed his one half interest, by quitclaim deed, to the plaintiff, R. M. Bourland.

Fifth. Defendants admit that on the — day of —, 1902, all the lots in the City of Chickasha were scheduled and appraised by Arthur W. Hefley and Wesley B. Burney, Townsite Commissioners for the Chickasha Nation, and that said lot was by the Clerks of said commission scheduled as in litigation, temporarily.

Sixth. Defendants deny that part of the record showing said lot was in litigation was afterwards abstracted from said record and that



defendants F. E. Riddle and Matt Cook fraudulently procured said Townsite Commission to schedule and list said lot to them.

Seventh. Defendant F. E. Riddle admits that he was attorney for defendant J. P. Ellis in said litigation.

49 Eighth. Defendants deny that said defendants F. E. Riddle and Matt Cook immediately after the commission of said fraud forwarded to the defendant, J. Blair Shoenfelt, the full appraised value of said lot, as alleged; but admit that they, after said lot was scheduled and listed to them and notice served on them as required by law that they had the right to purchase said lot at 62½% of the appraised value, forwarded said amount to said J. Blair Shoenfelt at Muskogee, Indian Territory, in payment of the purchase price to the Government, and that by so doing said defendants F. E. Riddle and Matt Cook acquired legal and equitable title to said property.

Ninth. Defendants deny that all of said parties are insolvent, as alleged; but admit that they are in the lawful possession of said property. Defendants deny that unless an injunction is granted plaintiffs will suffer irreparable injury; deny that said defendants as alleged continuously keep said property in litigation for no other purpose than to derive the rents therefrom.

Wherefore, defendants pray that said petition be dismissed and that they have their costs herein expended and pray for such other general and special relief as they may be entitled to in law and equity, and also further pray that said title to said lot be quieted to said defendants F. E. Riddle and Matt Cook.

A. C. CRUCE,  
F. E. RIDDLE,  
*Att'ys for Defendants.*

50 Personally appeared before me the undersigned F. E. Riddle, who on oath states that he is one of the defendants in the above entitled cause and that the facts and statements contained in the above answer are true.

F. E. RIDDLE.

Subscribed and sworn to before me this 29th day of September, A. D. 1902.

MAMIE DEVLIN,  
*Notary Public.*

Plaintiffs further state that on the 19th day of Feb'y, 1903, being one of the regular days of the term of Court at Chickasha, I. T., the defendants herein, R. M. Bourland and J. E. Cross appeared in person and in open court, and by attorney voluntarily caused the mismissal of said suit in equity, as above referred to herein, and judgment of the court was duly given and made and entered in said cause, in word and figures following, towit:



"R. M. BOURLAND et al., Plaintiffs,  
vs.  
D. H. JOHNSON et al., Defendants.

*Judgment.*

Now at this time came on to be heard the above entitled cause, and plaintiffs appearing in person and by attorney, and the defendants, F. E. Riddle, Matt Cook and J. P. Ellis appearing in person and by attorney, and after issues being joined herein plaintiffs in open court announced that they would not further prosecute said suit and desired to dismiss the same, and hereby in open court dismiss said complaint in equity.

It is therefore considered, ordered and adjudged by the court that said petition in equity be and the same is hereby dismissed at plaintiffs' cost and defendants have their costs herein expended for all of which let execution issue.

Plaintiff- state that by reason of said facts herein alleged *and* each and all of the matters and things set up in said bill in equity filed by said R. M. Bourland and J. E. Cross were adjudicated and determined against them and in favor of plaintiffs  
51 herein, and the said R. M. Bourland and J. E. Cross have ever since said day and date been estopped and are now estopped from setting up any of said matters and things against the plaintiffs herein, and by reason of said facts the premises above described were determined and adjudged to be the property of the plaintiffs herein and not the property of the defendants herein.

Wherefore, plaintiffs pray that the defendants be cited to appear and answer herein and that on final hearing said plaintiffs have judgment against said defendants and each of them for the possession and title to said lot and that plaintiffs be adjudged the absolute owners of said lot and that title be quieted in them; and that they also have their rents, at the rate of \$125.00 per month, together with all their costs, and pray for such other general and special relief as they may be entitled to in the premises.

A. C. CRUCE.  
W. A. LEDBETTER.  
FRANK M. BAILEY.

INDIAN TERRITORY.

*Southern District:*

Personally appeared before me the undersigned authority, F. E. Riddle, who on oath states that the facts and statements contained in the above complaint are true to the best of his knowledge and belief.

F. E. RIDDLE.

Subscribed and sworn to before me this 12th day of December, 1905.

MAMIE DEVLIN, [SEAL.]  
Notary Public.

52 And on the back of said 1st Amended Complaint of plaintiffs appeared the following endorsement: Filed in open court, Dec. 12, 1905, C. M. Campbell, Clerk.

And afterwards, towit, on the 12th day of December, 1905, defendants, R. M. Bourland and Ella Cross filed in said Court, their 2d Amended Answer to plaintiffs' complaint, which is in the words and figures following, towit:

*Second Amended Answer.*

In the United States Court for the Southern District of the Indian Territory, Sitting at Chickasha, December Term, 1905.

F. E. RIDDLE et al., Plaintiffs,  
vs.  
W. D. BELL et al., Defendants.

*Second Amended Answer.*

Now comes the defendants, R. M. Bourland and Mrs. Ella Cross and beg leave of court to amend their former answers herein and in answer to the amended complaint filed by the plaintiffs on this date, allege as follows:

First. These defendants deny that the plaintiffs are the owners, either legal or equitable of the lot described in their amended complaint, they also deny that plaintiffs are entitled to the immediate possession of said lot; they deny that the plaintiffs  
53 are now or ever were the owners of the improvements situated thereon, and deny that they had any right to have the same scheduled to them. Defendants also deny that the bill in equity alleged to have been filed by the plaintiffs in this case on the 15th day of July, 1902, was dismissed by plaintiff- after issues joined, or that defendants are in any way precluded thereby from setting up their title to said lot in this action.

Second. The defendants further answering herein allege that one Theo. Fitzpatrick then being the owner of the lot mentioned in plaintiffs' complaint together with all the improvements thereon situated, instituted an action of unlawful detainer against one J. P. Ellis in this court on or about the 7th day of July, 1898, to recover from him the possession of said lot, said cause being numbered 267 on the docket of this court; that said cause was tried on the amended complaint of the plaintiff, Theo. Fitzpatrick a copy of which is hereto attached and marked Exhibit "A" and made a part of this answer, and on the amended answer of the defendant J. P. Ellis, a copy of which is hereto attached, *is hereto attached* market Exhibit B and made a part of this amended answer. That on the 21st day of October, 1902, said cause of Theo. Fitzpatrick vs. J. P. Ellis was duly tried in this court and a judgment rendered, a copy of which judgment is hereto attached, marked Exhibit C and made a part

of this amended Answer. From which judgment the said  
54 J. P. Ellis prosecuted an appeal to the United States Court  
of Appeals for the Indian Territory, sitting at South Mc-  
Alester, Indian Territory, which court duly affirmed said judg-  
ment of the Court of appeals for the Indian Territory, and from  
the said judgment of the Court of Appeals for the Indian Territory  
the said Ellis prosecuted a further appeal on writ of error to the  
Circuit Court of Appeals for the Eighth Circuit sitting at St. Paul  
which court also affirmed both of the judgments of the Courts of  
Appeals. That the said J. P. Ellis superseded the said judgment  
of this court and of the Court of Appeals for the Indian Territory  
by giving supersedeas bond and was thereby enabled to retain  
possession of said lot pending said appeals; that after the institution  
of said suit of Theo. Fitzpatrick against J. P. Ellis, the said Fitz-  
patrick joined by his wife, conveyed and transferred said lot to  
Mrs. Ella Cross, on the 8th day of April, 1899. A copy of which  
transfer is hereto attached, marked Exhibit D and made a part of  
this amended answer. And that on the 18th day of September,  
1900, the said Mrs. Ella Cross, joined by her husband, J. E. Cross,  
conveyed an undivided one half interest in said lot to the defendant,  
R. M. Bourland a copy of which transfer is hereto attached, marked  
Exhibit E and made a part of this answer. That from and after  
the execution of said deed from Theo. Fitzpatrick and his wife to  
Mrs. Ella Cross he continued to prosecute the suit of Theo. Fitz-  
patrick against J. P. Ellis, for the use and benefit of these de-  
fendants, and the judgment rendered in said cause, though in the  
name of Theo. Fitzpatrick, in fact inured to the benefit and  
55 was the judgment of these defendants. That by reason of  
said judgment and the transfers aforesaid these defendants  
became the owners of the said lot, together with all the improve-  
ments thereon and were entitled to the immediate possession thereof.

Third. That by reason of said suit of Fitzpatrick against J. P. Ellis, the judgment therein rendered, the defendants became the owners of the improvements on said lot, and the said J. P. Ellis and anyone claiming under him were thereby estopped and concluded from setting up any claim to said improvements, because the ownership thereof and the right to possession thereof had been adjudged to these defendants by the judgment in said cause; that if said improvements were not specifically mentioned in said judgment, or if the ownership thereof was not specifically made an issue in this cause still the ownership thereof was the proper issue to be made in said cause and could and should have been made in said cause, and the failure to make the same an issue, on the part of the said Ellis estopped and precluded him and his privies from again asserting any title to said property.

Fourth. These defendants further say that if the said Ellis ever did own said improvements or any interest therein, he abandoned, waived and forfeited the same by denying the title of the said Fitzpatrick to said lot and by repudiating and denying the rental contract under which he held said improvements and by wrongfully

56 claiming to be the owner of said lot himself and by refusing to remove said improvements from said lot for such long time after the term of his lease expired, and that after said refusals denials and waivers, the said Ellis and his privies could not again assert the right to remove said improvements from said lot and said improvements did in fact and in law become fixtures upon said lot and a part of said realty and the property of the owner of said lot.

Fifth. That if the plaintiff or either one of them ever had or acquired any interest in said improvements they acquired the same from the said J. P. Ellis pending the litigation aforesaid between him and the said Fitzpatrick and with full knowledge, both actual and constructive, of the rights of the said Fitzpatrick and of these defendants in and to said lots and improvements and with full knowledge of the waivers refusals and forfeitures of the said Ellis heretofore set out.

Sixth. These defendants further allege that if the plaintiffs have any transfer or assignment from the said J. P. Ellis of his interest in the improvements on said lot dated back prior to the institution of the suit of Fitzpatrick against Ellis, then they say that the plaintiffs ought not to be allowed to avail themselves of said transfer or assignment in this controversy, for the reason that they have continuously suppressed the same and held the said Ellis out to the world as the owner of said improvements; that the said Ellis was in possession of said lot claiming to be the owner of said improvements at the time of the institution of said original suit and continued to be and remain in possession and control of the same until excluded therefrom by the process of this court upon the affirmance of the judgment of the said original cause of Theo. Fitzpatrick against J. P. Ellis which was about the 1st of Jan'y 1903; that during all of said litigation the said F. E. Riddle was the attorney for the said J. P. Ellis, that he filed pleadings in said original cause for the said J. P. Ellis, asserting the right of the said J. P. Ellis to remain in possession of said lot, and that the said J. P. Ellis was then the owner of said improvements, that said pleadings were filed as late as the October Term of this court in 1900, and that upon the trial of said cause the said Riddle had the said Ellis to swear that he was then the owner of said improvements and that since the institution of this suit, the said Riddle has taken the testimony of the said Ellis and had him to swear that he, Ellis, was the owner of the improvements up to as late as June, 1902, and for that reason the plaintiffs are as much bound by the judgment in the case of Fitzpatrick vs. Ellis as Ellis himself.

Seventh. These defendants further allege that they purchased said lot from Theo. Fitzpatrick, that they knew nothing whatever of any claim of the said Riddle in or to the improvements on said lot, they have paid for said lot without ever knowing said fact; that the first time these defendants ever heard that the plaintiffs herein were claiming any interest in said improvements was when 58 they learned that the Townsite Commission had scheduled the lot in controversy to them on the ground that they owned said buildings.

Eighth. These defendants further show that it was their intention when they purchased said lot from Fitzpatrick to erect valuable, permanent and substantial improvements thereon in the way of buildings, as soon as they could obtain possession of the same and to purchase said lot when it was placed for sale by the Townsite Commission, that they were prevented from carrying these purposes into effect by the wrongful acts of the defendant Ellis, acting under the advice and direction of the plaintiff Riddle, in appealing from the judgment of this court in said cause of Fitzpatrick against Ellis and superseding the said judgments, and for this reason and this alone these defendants were prevented from erecting their said substantial and permanent improvements on said lot, and were never able to place any further or other improvements on said lot from the date of their said purchase, except that in the early part of the year 1901, these defendants and the said J. P. Ellis acting under the direction and advice of the said Riddle entered into an agreement with the First National Bank of Chickasha, I. T. that said Bank might erect a brick wall for a two story building along the eastern line of said lot, placing one half of said wall on said lot which should become a part of said lot and belong to the rightful owner thereof. And that as soon as the cause of Fitzpatrick against Ellis was finally determined, that the successful party in that litigation should pay to the First National Bank the sum of seven hundred fifty dollars, the same being one half of the cost of erecting said brick wall. That said bank did in the early part of the year 1901, erect said wall upon said lot and as soon as said litigation was finally determined or in the early part of the year 1903, these defendants did pay to the said First National Bank of Chickasha, the said seven hundred and fifty dollars, so expended by defendants in the erection of said brick wall.

Ninth. These defendants further say that when the Townsite Commission came to lay off and plat the said town of Chickasha into streets, alleys, lots and blocks, the said litigation with reference to the lot in controversy in this cause was still pending and it was the duty and intention of said Townsite Commission to schedule said lot as in controversy, not scheduling the same to anyone at all until said litigation was finally determined; that in pursuance to its duty and intention the said Townsite Commission did first schedule said lot as in litigation, and did not schedule the same to any one; that these defendants knew that said lot was properly scheduled as in litigation and not scheduled to anyone by said commission, that after these defendants had learned that this lot had been scheduled as in litigation, knowing that this was proper, these defendants did not give the matter any further attention, and later and without the knowledge of these defendants the plaintiff, by some means unknown to these defendants, induced the said Townsite Commission to change its first schedule and schedule said lot to them; that as soon as these defendants learned that said lot had been so scheduled they filed a protest with the Hon. J. Blair Shoenfelt, United States Indian Agent, protesting against the issuance of any patent to said lot to the plaintiffs; that

in recognition of said protest the said Shoenfelt has held up the patent to said lot and will continue to do so until this controversy between the plaintiffs and defendants, as to the ownership of said lot has been fully determined.

Tenth. These defendants further say that by reason of their ownership of said lot and of said improvements and by reason of the judgments aforesaid and by reason of their placing a brick wall on said lot which is a valuable, substantial and permanent improvement other than temporary buildings, fencing and tillage of the soil, and would have itself entitled these defendants to the right to purchase said lot and have the same scheduled to them, they had and have the prior right to purchase said lot as an improved lot, that the action of the Townsite Commission in scheduling said lot to the plaintiffs herein was an error and mistake and was done without the knowledge of these defendants and without giving them an opportunity to present their rights to the said commission which mistake and wrong was brought about and induced by the action of the plaintiff herein.

- 61 Eleventh. That if the plaintiffs have actually paid the purchase price of said lot these defendants are willing and ready to repay same and do hereby offer to make said payment as soon as the rights acquired by such payment are transferred to these defendants.

Wherefore defendants pray judgment.

POTTER, BAREFOOT & CARMICHAEL,  
*Attorneys for Defendants.*

INDIAN TERRITORY,  
*Southern District:*

R. M. Bourland, of lawful age, having first been duly sworn on oath states that he is one of the defendants in the above styled and entitled cause, and that he has read the foregoing amended answer and that the allegations set forth therein are true as he verily believes.

Subscribed and sworn to before me on this the 12th day of Dec. 1905.

\_\_\_\_\_,  
*Notary Public.*

## (EXHIBIT A.)

In the United States Court for the Southern District of the Indian Territory, Sitting at Chickasha.

THEO. FITZPATRICK, Plaintiff,

vs.

J. O. ELLIS et al., Defendants.

*Second Amended Complaint.*

62 Now comes Theo. Fitzpatrick, plaintiff herein, and by permission of court first had and obtained, files this his amended complaint and says:

That on or about this — day of —, 1897, by a verbal lease made on said date, at Chickasha, Indian Territory, with J. P. Ellis, one of the defendants herein, leased demised and let unto the said Ellis, the premises situate, lying and being in the town as shown by the original plat thereof, a copy of which is now in the office of Beavers and Sayer in said town, to have and to hold the said premises to the defendant for the term of one month, and from month to month thereafter, until terminating at the option of either party, or by the failure of said lessee to pay rent therefor according to the terms thereof, at the monthly rental of five dollars per month payable monthly in advance.

That by virtue of said lease said defendant went into the possession of said premises; he and those under him paid rent thereunder and he and those under him still continue to hold and occupy same.

That notwithstanding repeated demands have been made by the plaintiff of the defendants they have refused and neglected to pay the rent due upon said premises from the 1st day of April, 1898, according to the terms and conditions of said lease, but that said defendants held over and continue in possession of said premises without the permission of said plaintiff and contrary to the terms of said lease.

63 That at the time of entering into said lease aforesaid he was in the peaceable possession of said premises and is now entitled to the same.

That plaintiff since the termination of the term for which the premises were demised as aforesaid, did, to-wit, on the 2d day of July, 1898, make a demand in writing of said defendants (a copy of which is hereto attached as a part of the original complaint filed herein and marked Exhibit A and made a part of this amended complaint) to deliver up and surrender to plaintiff the possession of said premises.

That notwithstanding said notice said defendants have failed and refused and neglected and still refuse and neglect to quit and deliver up the possession of said premises, contrary to the form of the statute made and provided in such cases.

That there is still due plaintiff as delinquent rents upon said



premises from the defendants the sum of five dollars per month from the 1st day of April, 1898; that the monthly rental value of said demised premises is five dollars.

That by Act of Congress passed July 1st, 1898, entitled "An Act for the Protection of the people of Indian Territory and for Other Purposes," provision is made for the adjustment of title to town lots in towns in the Indian Territory.

That in order to comply with the provisions of said act that his right to said premises may be properly protected, plaintiff desires to place substantial, valuable and permanent improvements thereon.

That unless plaintiff and his agents be permitted to enter thereon and thus permanently improve the premises therein, plaintiff will suffer great and irreparable injury for which there is no adequate remedy at law, and that defendant in depriving plaintiff of the possession of the aforesaid premises, pendente lite, threatens to render the judgment of this court ineffectual.

Wherefore plaintiffs pray that the court grant an injunction, instant, restraining defendants, their agents, attorneys, and servants from in any manner interfering with plaintiff or his agents in the use and occupation of so much of the improved part of said premises as may be necessary for him to use in permanently improving said premises.

BEAVERS & SAYERS,  
*Att'ys for Pl't'ff.*

INDIAN TERRITORY,  
*Southern District:*

Theo. Fitzpatrick, being first duly sworn, deposes and says that he is the plaintiff in the above styled action, that he read the above and foregoing amended complaint and that the allegations therein contained are true.

THEO. FITZPATRICK.

Subscribed and sworn to before me this 16th day of Feby., 1899.  
[SEAL.] C. T. ERWIN,  
*Notary Public.*

65

(EXHIBIT B.)

In the United States Court for the Southern District of the Indian Territory, at Chickasha, October Term, 1900.

THEO. FITZPATRICK, Plaintiff,  
vs.  
J. P. ELLIS et al., Defendants.

*Answer at Law.*

Now comes J. P. Ellis one of the defendants in the above entitled cause and leave of court being first granted files this his amended answer herein and for such amendment denies:



First. That he had a verbal lease or any other kind of a lease on or about the — day of —, 1897, with the plaintiff Theo. Fitzpatrick or at any time where the plaintiff leased and demised and let to the said defendant J. P. Ellis the premises described in plaintiff's complaint or any other premises.

Second. Defendant denies that he went into possession of said lots as described in plaintiff's complaint under plaintiff at any time and denies that he now holds possession of said lot under plaintiff in any way.

Third. Defendant denies that there is due plaintiff any rents or that he owes plaintiff any rents as alleged in said complaint and denies that he holds any continuous possession of said premises unlawfully.

Fourth. That defendants deny that plaintiff was ever in peaceable possession of said premises, or was ever in possession of the same at any time and denies that plaintiff made a lawful demand on the defendant to quit and give possession of said lot.

66 Fifth. Defendant denies that there is due plaintiff as delinquent rents or any other money in the sum of fifteen dollars or any other sum.

Sixth. Further answering this defendant states and charges the truth to be, that on the — day of —, 1897, one Theo. Barnhart owned certain improvements situated on the lot described in plaintiff's complaint consisting of a boxed building about twenty four by forty feet, used and occupied as a butcher shop, together with other out buildings, which improvements the said Theo. Barnhart had long time prior thereto erected and placed upon said lot and all improvements thereon.

Seventh. That on or about said date this defendant arrived here from the State of Texas knowing nothing about the land tenure of lots situated in the Indian Territory, except that he had been advised and knew that they belonged to the Chickasaw and Choctaw Tribes of Indians. That this defendant had been advised and informed that no person could purchase or own said lots but could only purchase the right of occupancy and the improvements thereon, together with the privilege and right of purchasing said lots when they were for sale by the Government of the United States and the Chickasaw Nation.

67 Eighth. That on or about the — day of September, 1897, he purchased all of the said improvements upon said lot as above described from the said Theo. Barnhart in good faith, and at the time of said purchase from Theo. Barnhart, he represented and led defendant to believe that by purchasing said improvements he would then have the right and privilege of purchasing said lot when sold as above described. That at the date of said purchase the said Theo. Barnhart nor any other person advised him or informed him that the plaintiff or any other person claimed to have any interest in or to said lot or property, whatever, nor did the defendant have any notice whatever, prior to the purchase of said improvements nor for a long time thereafter that this plaintiff, or anyone else, claimed any interest in or to said prop-

erty, but on the other hand was led to believe and did believe that by purchasing all of said improvements he purchased the right to use and occupy said lot and all right that any person could own in and to said lot, until they were sold by the Government and that then he would have the right and privilege to purchase same.

Ninth. That this defendant is now the legal and lawful owner of valuable, permanent and substantial improvements, situated upon said lot sued for by the plaintiff herein, and is the owner of all improvements situated upon said lot which facts is conceded by plaintiff, and that he has been the owner of all improvements situated upon said lot since he purchased same in the fall of 1897, and that plaintiff has never owned or claimed to own any improvements on said lot whatever and does not now claim to own  
68 any of said improvements situated upon said lot but admits that this defendant is the owner of all of said improvements.

Tenth. That defendants further state that plaintiff is not and never has been a member of any tribe of Indians and has never resided in the town of Chickasha, Indian Territory.

Eleventh. That said plaintiff has never at any time had any improvements upon said lot described in said complaint, nor has he at any time ever been in possession of the same.

Wherefore, this defendant prays that he have judgment for the possession of said property, and have all cost of suit in this behalf expended and for all other relief that he may be entitled to either in equity or good conscience.

DAVIDSON & RIDDLE,

*Attorneys for Def'ts.*

#### EXHIBIT C.

THEO. FITZPATRICK

vs.

J. P. ELLIS et al.

On this the 20th day of October, 1900, this cause came on to be heard. The said parties appeared in person and by attorneys and answered ready for trial, when John Coyle and eleven other jurors, who had been previously sworn, were empanelled to try said cause, and having heard the evidence in the case and instructions  
69 to the jury, the jury retired to consider of their verdict, and subsequently returned into court and being called answered to their names, returned the following verdict:

"We, the jury empanelled and sworn to try the above entitled cause, find for the plaintiff for the possession of the property claimed and assess the damages at one hundred and fifty dollars, rental value of said property for two *two* years and a half.

JOHN COYLE, *Foreman.*

It is therefore ordered, considered and adjudged by the Court that the plaintiff, Theo. Fitzpatrick, do have and recover of and from the said J. P. Ellis, the premises set out in the complaint, to wit:

Lot three in Block forty-six in the incorporated town of Chickasha, Indian Territory, together with his costs, and that a writ of possession issue for said property. It is further ordered, considered and adjudged by the court that the plaintiff, Theo. Fitzpatrick, have and recover of and from the said J. P. Ellis, and W. A. Goven, D. H. Butler and Joe Anderson, as sureties, the sum of one hundred and fifty dollars for which let execution issue.

## EXHIBIT D.

Know all men by these presents, that we, Theo. Fitzpatrick and Maria Fitzpatrick, husband and wife of Bradley, I. T. in consideration of the sum of Five Hundred dollars to us in hand paid by Mrs. Ella Cross, of Chickasha, I. T. the receipt of which is hereby acknowledged, do hereby remise, release, and forever quit-claim unto the said Mrs. Ella Cross, all that tract or parcel of land described as follows: Lot No. 3, in Block No. 46, on Chickasha Avenue, in the town of Chickasha, in the Southern District of the Indian Territory.

To have and to hold the aforesaid premises together with all the privileges and appurtenances thereto belonging to the said Mrs. Ella Cross, her heirs and assigns, to their use and behoof forever.

And we do hereby for ourselves and our heirs, executors and administrators, covenant with the said grantee and her heirs and assigns, that the granted premises are free and clear from all incumbrances made or suffered by us, and that we will each for our heirs, executors, administrators or assigns defend the same to the said grantee, her heirs and assigns forever, against the lawful claims and demands of all persons, by through or under us or either of us.

In witness whereof, we have hereunto set out hands this the 8th day of April, 1899.

THEO. FITZPATRICK.  
MARIA FITZPATRICK.

In the presence of—

C. M. FECHHEIMER.

W. A. BOHART.

INDIAN TERRITORY,  
*Southern District:*

On this the 8th day of April, 1899, before me a Notary Public within and for the southern district of the Indian Territory, appeared in person Theo. Fitzpatrick to me personally well known as the person whose name appears upon the above deed of conveyance as one of the parties grantor and stated that he had executed the same for the considerations and purposes therein set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Maria Fitzpatrick, wife of Theo. Fitzpatrick, to me well known to be the person whose name appears on the above deed, and in the absence of her said husband, declared that she had of her own free

will, signed the relinquishment of dower therein expressed and for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand and Notarial seal at Chickasha, Indian Territory, on the 8th day of April, 1899.

CEAS. M. FEICHERIMER,

*Notary Public.*

### EXHIBIT E.

Know all men by these presents: That we, J. E. Cross and Ella Cross, his wife, for and in consideration of the sum of one dollar, to *them* paid by R. M. Bourland, do hereby grant and sell and quit-claim unto the said R. M. Bourland and unto his heirs and assigns forever, the following lands lying in the town of Chickasha, I. T. to-wit: An undivided one-half interest in Lot three, in Block forty-six, on Chickasha Avenue, in the town of Chickasha, Southern District of the Indian Territory.

72 To have and to Hold, unto the said R. M. Bourland and unto his heirs and assigns forever, with all appurtenances thereunto belonging.

And *I* do for *myself*, *my* heirs, executors and administrators covenant with the said grantees and his heirs and assigns that the granted premises are free, clear and discharged of and from all incumbrances made or suffered by *me* and that *I* will and *my* heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through or under *me*.

And I, Ella Cross, wife of the said J. E. Cross, for and in consideration of said sum of money, do hereby release and relinquish unto the said R. M. Bourland, all my right of dower in and to said lands.

Witness our hands on this the 18th day of September, 1900.

ELLA CROSS,

J. E. CROSS.

INDIAN TERRITORY,  
*Southern District:*

Be it remembered that on this day personally came before me, the undersigned, a Notary Public, in and for the Southern District of the Indian Territory, duly commissioned and acting, J. E. Cross, to me well known as grantor in the foregoing deed and stated that he had executed the same for the purposes and considerations

73 therein expressed and set forth.  
And on the same day also voluntarily appeared before me the said Ella Cross, wife of said J. E. Cross, to me well known, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the considerations and purposes therein mentioned and set forth, and without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public, on this, the 18th day of September, 1900.

[SEAL.]

CHAS. M. FECHEIMER,

Notary Public.

My commission expires Nov. 8th, 1900.

And on the back of said 2d Amended Answer, appears the following endorsement: Filed in open court. Dec. 12, 1905. C. M. Campbell, Clerk.

And afterwards, towit, on the 12th day of December, 1905, plaintiffs filed in said court their demurrer to defendants' answer, which said demurrer is in the words and figures following, towit:

In the United States Court within and for the Southern District, Indian Territory, at Chickasha.

74 F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Demurrer.*

Now come the plaintiffs, F. E. Riddle and Matt Cook and demurring to the answer of the defendants, R. M. Bourland and Mrs. Ella Cross, say that said answer is insufficient in law and does not state facts constituting a defense to plaintiffs' cause of action, as alleged in their amended petition filed herein, and of this said plaintiffs pray the judgment of the court.

Second. Said plaintiffs specially demur to the first paragraph of said amended answer and say that the same is insufficient in law and constitutes no defense to the cause of action set up by the plaintiffs, in this, that the Chickasaw Townsite Commission, as alleged in said complaint, had jurisdiction and right to determine the ownership of the improvements of the *improvements of the* premises in controversy, and did determine the ownership of said improvements to be in the plaintiffs, F. E. Riddle and Matt Cook, and this court is without authority in this action to investigate the correctness of such determination and decision as to the ownership of said improvements by said Chickasaw Townsite Commission. Said plaintiffs further demur to the first paragraph of said answer for the reason that the same attempts to set up an equitable defense to plaintiffs' cause of action, which is not permissible in an action of ejectment, and of this the plaintiffs pray the judgment of the court.

75 Third. The said plaintiffs specially demur to the second paragraph of said amended answer of said Bourland and Cross and say that the same constitutes no defense to the cause of action set up by the plaintiffs in their amended complaint, for the reason that *to* the proceeding and judgment in the unlawful detainer action referred to therein could not determine the ownership of the improvements upon the property in controversy, and that in said

unlawful detainer action of Theo. Fitzpatrick vs. J. P. Ellis, the plaintiff therein, who was the predecessor in the line of title to the said Bourland and Cross, did not claim to be the owner of said improvements and said judgment in no way determined the ownership of said improvements, and the said plaintiffs say that nothing in said action and the judgment therein constitutes any defense to the plaintiffs' cause of action, as set up in their amended complaint, and of this the said plaintiffs pray the judgment of the court, and for the reason that it does not appear that Fitzpatrick was a member of any Indian Tribe or authorized to lease said premises.

Fourth. The said plaintiffs further specifically demur to the second paragraph of said amended answer and say that the same constitutes no defense to plaintiffs' cause of action therein, for the reason that the same attempts to set up an equitable defense to the cause of action alleged by the plaintiffs, which is not admissible in an action of ejectment, and in this the plaintiffs pray the judgment of the court.

76 Fifth. Said plaintiffs demur to the third paragraph of said amended answer and say that the same is insufficient in law, for the reasons urged against the second paragraph of said amended answer, and for the further reason that the effect of the judgment and proceeding in the case of Theo. Fitzpatrick against J. P. Ellis, insisted upon in said third paragraph of said amended answer, is wholly unauthorized by law and the judgment in said action did not in any way determine the ownership of the improvements on the premises in controversy, nor the right to purchase said premises under the provisions of the Treaty between the Choctaws and Chickasaw nations and the United States; and of this plaintiffs pray the judgment of the court.

Sixth. Said plaintiffs specially demur to the fourth paragraph of said amended answer for the reason that the same attempts to set up an equitable defense to plaintiffs' cause of action, and for the further reason that it is not denied in said amended answer that the townsite commission determined that the plaintiffs were the owners of the improvements on the premises in controversy and entitled to purchase the same, and nothing in said fourth paragraph of said amended answer avoids the effect of said decisions in their favor and constitutes any defense to the plaintiffs' cause of action, and for the same reasons said plaintiffs demur to the fifth and sixth paragraphs of said amended answer.

77 Seventh. Said plaintiffs demur to the seventh paragraph of said amended answer for the reason that the same constitutes no defense to the plaintiffs' cause of action, and for the further reason that the law did not require said plaintiffs to give defendants herein notice of their ownership of the improvements upon said lot, and the fact that they purchased the lot, or an interest therein without knowledge of the ownership of said improvements on the part of the plaintiffs herein is wholly immaterial to this controversy, as it is not alleged in said answer that defendants claimed to own the improvements on said lot, or that they in any manner asserted an ownership of same before said townsite board or requested said board to appraise and award said lot to them.

Eighth. Said plaintiffs demur to the eighth paragraph of said amended answer and say that it is wholly immaterial to this controversy what the secret intention or purpose of said Theo. Fitzpatrick might have been with reference to the erection of permanent and valuable improvements on said lot in controversy, and the failure of said Theo. Fitzpatrick to get possession of said lot and improve the same constitutes no defense to this action; and said plaintiffs further demur to the eighth paragraph of said answer and say that the same constitutes no defense to plaintiffs' cause of action for the reason it attempts to set up an equitable defense why plaintiffs should not recover in this action, and for the further reason

78 that it is wholly immaterial to this controversy whether the First National Bank made a contract with the plaintiff Riddle with reference to the improvements upon said lot or not; the said commission having determined the ownership of said improvements and the purchase of said lot is in plaintiffs this court is without the power or jurisdiction to reverse or set aside said decision; and of this the plaintiffs pray the judgment of the court.

Ninth. Said plaintiffs demurring to the ninth paragraph of said answer state that the allegations therein contained constitute no defense to plaintiffs' cause of action, for the reason that it is not denied therein that the Townsite Commission determined the ownership of said improvements to be in the plaintiffs herein, and that the plaintiffs were entitled to purchase said premises, and this court is without power or jurisdiction to correct any mistake that may have been made by the commission in awarding said improvements to the plaintiffs herein and giving them the right to purchase said improvements.

Tenth. Said plaintiffs demur to the tenth paragraph of said answer for all the reasons herein alleged against the other paragraphs contained therein, and upon consideration of the whole answer of said defendants the plaintiffs pray that the same be held to be insufficient and constitute no defense to the plaintiffs' cause of action.

A. C. CRUCE,  
W. A. LEDBETTER AND  
FRANK M. BAILEY,  
*Attorneys for Plaintiffs.*

Endorsed: Filed in Open Court, Dec. 12, 1905, C. M. Campbell, Clk.

79 And afterwards, to wit, on the 3d day of December, 1906, plaintiffs filed in said court their motion to make other parties defendants in said cause, which said motion is in the words and figures following, to wit:



In the United States Court in and for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE and MATT COOK, Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Motion to Make Other Parties Defendants.*

Come now the plaintiffs herein and by leave of the court file this motion for leave to make the First National Bank Building Company of Chickasha, I. T. a corporation, and E. B. Johnson and H. B. Johnson, parties defendant in the above entitled cause, and for such motion state:

First. That since the institution of said suit the said First National Bank Building Company and the said E. B. Johnson and H. B. Johnson claim to have purchased some interest within and to said property in litigation in this suit and have been in possession of the same for some time past and collecting and using the rents and revenue therefrom, and are necessary parties to a complete determination of the rights of ownership to said property and the rents and revenue of same.

80 Wherefore, plaintiffs pray that the court make an order allowing plaintiffs to make the said parties named parties defendants in said suit.

W. A. LEDBETTER,

A. C. CRUCE &

FRANK M. BAILEY,

*Att'ys for Pl't'ffs.*

Endorsed on back: Filed in open court, Dec. 3, 1906. C. M. Campbell, Clerk.

*Journal Entry: Order of Court.*

Seventh Day, November Term, Dec. 3d, 1906.

F. E. RIDDLE et al.

vs.

W. D. BELL et al.

**Judgment.**

Now at this time, after the order of continuance having been set aside came on to be heard the motion of plaintiff herein for an order permitting them to make the First National Bank Building Company of Chickasha, I. T., a corporation and E. B. Johnson and H. B. Johnson parties defendant in the above entitled cause and it appearing to the court from said motion that said parties are necessary parties interested in said litigation and for a complete



determination of said cause of action and settling the rights of all parties it is necessary that they be made parties defendant.

It is therefore considered ordered and adjudged by the court that the said First National Bank Building Company of Chickasha, I. T. and the said E. B. Johnson and H. B. Johnson be made

81 parties defendant in said cause and that the Clerk of this Court issue — herein on or before the next term of this court.  
J. T. DICKERSON, *Judge*.

And afterwards, to wit, on the 3d day of December, 1906, plaintiffs filed in said court their Second Amended Complaint at Law, which said complaint is in the words and figures following, to wit:

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Come now the plaintiffs, F. E. Riddle and Matt Cook and leave of the Court first being had file this their second amended complaint herein and by order of the court make H. B. Johnson and E. B. Johnson and the First National Bank Building Company, a corporation, party defendants herein.

First. Plaintiffs represent to the court that they are residents of Chickasha, Southern District of the Indian Territory, and that the property hereinafter described and in litigation is situated within said city of Chickasha, I. T. and that the defendants W. B. Bell, Thomas Sinclair, Jas. Recheif and Theodore Fitzpatrick are all residents of the City of Chickasha I. T. and have filed

82 their answer herein disclaiming any interest in said property, and the defendants R. M. Bourland and Mrs. Ella Cross have been made party defendants upon their own motion, and said defendant Bourland is a non-resident of the said Indian Territory, and the said Mrs. Ella Cross is a resident of Chickasha, I. T. the defendant H. B. Johnson is a resident of the City of Chickasha, I. T., and the defendant E. B. Johnson is a non-resident of the said Indian Territory and a resident of Norman, Oklahoma Territory; that the defendant, the First National Bank Building Company is a corporation duly organized under the laws of the United States and the defendant H. B. Johnson is the President of said corporation, upon whom service may be had.

Second. Plaintiffs state that the plaintiff F. E. Riddle has purchased all the right, title and interest within and to said property in litigation from his co-plaintiff, Matt Cook, since the institution of this suit and that he is now the rightful legal and equitable owner of all of said property now in litigation.

Third. For cause of action plaintiff F. E. Riddle states that he is the legal and equitable owner of Lot N-. 3 in Block 46 as per the

official plat of the City of Chickasha, I. T. situated on the South side of Chickasha Avenue and being twenty-five feet wide by 165 feet in length.

Fourth. Plaintiffs further state that on the 28th day of June, 1898, and on the — day of March, 1902, one J. P. Ellis was in

83 possession of said lot and was the owner of permanent, lasting and valuable improvements situated upon said lot other than temporary houses and tillage, and was the absolute and undisputed owner of all of said improvements situated upon said lot, and for a valuable consideration said J. P. Ellis sold, conveyed and transferred all of said improvements then owned by him to said plaintiffs herein, F. E. Riddle and Matt Cook. A copy of said bill of sale is hereto attached, marked Exhibit B and made a part hereof.

Fifth. That on, towit, the — day of March, 1902, the said plaintiff- herein appeared before the Townsite Commission of the Chickasaw Nation and asked that said lot be scheduled and appraised to them by reason of the fact that they were the owners of all of said improvements situated upon said lot and that the same were valuable, lasting and permanent, and that thereupon said commission, being of the opinion that said plaintiffs were the undisputed owners of all of said improvements, duly appraised and scheduled the same to said plaintiffs herein according to law.

Sixth. That thereafter, and on the 12th day of June, 1902, notice was served upon said plaintiffs of said appraisement and of their right to purchase said lot. A true copy of said notice is hereto attached, marked Exhibit A and made a part of this complaint.

Seventh. That afterwards, towit, on the — day of June, 1902, plaintiffs, in accordance with said notice were permitted to and

84 J. Blair Shoenfelt, then U. S. Indian Agent, for Union Agency at Muskogee, who was by law authorized to receive did purchase said lot, and as required by law, forwarded to the same, the sum of \$375.00, being the required amount for the payment of the purchase price of said lot, as shown by said schedule and appraisement and notice thereof.

Eighth. That on, towit, the 28th day of June, 1902, the said J. Blair Shoenfelt, as such Indian Agent as aforesaid, duly issued his receipt for said payment, which receipt is in words and figures as follows, towit: "Finis E. Riddle, Matt Cook, Chickasha, I. T. Sirs: I acknowledge receipt of your remittance of \$375.00 the same being in full payment of Lot 3 Block 46 in the town of Chickasha, I. T., as per statements accompanying remittance. Very respectfully, J. Blair Shoenfelt, U. S. Agent." Also a copy of said receipt is hereto attached marked Exhibit C and made a part of this complaint.

Ninth. That said plaintiffs have done everything required of them to be done to entitle them to a patent to said lot, and that by virtue of complying with the law relative to the purchase of said lot and by virtue of the purchase thereof, and the payment of the full purchase price thereof, as required by law, and by virtue of the receipt of same by said U. S. Indian Agent, as aforesaid,

legal and equitable title to said property herein described vested in said plaintiffs and they have been ever since said date and are now the legal and equitable owners of said property. That as evidence of said title the patent issued on the — day of 85 June, 1907, is hereto attached and made a part of said complaint.

Tenth. Plaintiffs state that on the — day of January, 1903, said W. D. Bell, Thomas Sinclair and Jas. Reecheif, who were occupying said lot and premises under a rental contract with plaintiffs, wrongfully and unlawfully repudiated their contract and entered into possession and attorned to the defendants Theodore Fitzpatrick, R. M. Bourland and Mrs. Ella Cross, and are now wrongfully and unlawfully holding possession of said lot against plaintiffs' consent and refuse to vacate the same.

Eleventh. That long after the institution of this suit the defendants H. B. & E. B. Johnson and the First National Bank Building Company, as aforesaid, claimed some kind of an interest in said property by virtue of a pretended purchase from the said R. M. Bourland and Mrs. Ella Cross, and have gone into possession of said property and are receiving the rents and revenues therefrom.

Twelfth. Plaintiffs further state that the reasonable rental value of said property herein described from the first day of February, 1903, until the first day of January, 1904, was \$37.50 per month, and that since the first day of January, 1904, the reasonable rental value of said property has been \$135.00 per month, for which amount they ask judgment against said defendants, together with a reasonable rate of interest, thereon until the date they finally secure possession of said property.

Thirteenth. Plaintiffs state that on the 15th day of July, 1902, the said defendants R. M. Bourland and Mrs. Ella Cross, prior to the time the said defendants H. B. & E. B. Johnson and the First 86 National Bank Building Company claim to have purchased any interest within and to said lot, filed their petition or bill in equity in this court, wherein plaintiffs herein and J. P. Ellis, D. H. Johnson, G. W. Dukes, and J. Blair Shoenfelt, U. S. Indian Agent, were defendants, on the equity side of the docket of said court, said cause No. 694 and styled "R. M. Bourland et al. vs. D. H. Johnson et al." That the real parties in interest in said suit were the plaintiffs herein and the said J. P. Ellis, and the said D. H. Johnson, G. W. Dukes and J. Blair Shoenfelt claimed no interest whatever in the said property and were really nominal parties thereto. Said bill in equity filed by said plaintiffs is in words and figures, omitting the caption, to wit:

"The plaintiffs, R. M. Bourland and J. E. Cross, complaining of the above named defendants, for cause of action say:

That on the — day of February, 1899, Theodore Fitzpatrick filed his complaint in the United States Court for the Southern District of the Indian Territory, at Chickasha against J. P. Ellis, claiming the possession of lot three (3) in Block Forty-six (46) as shown by the official plat of the town of Chickasha; that at the October 1900 term of said court said cause was tried by a jury, a verdict rendered for

the plaintiff and judgment rendered for the possession of said property, as shown on page II of the transcript of said cause herewith filed and made a part of this complaint.

That on the 4th day of February, 1901, the said J. P. Ellis filed his appeal in the United States Court of Appeals for the Indian Territory, and that said cause was submitted at the — term, 1901.

That at the — term, 1901, of the United States Court of Appeals an opinion was rendered in said cause, in which opinion the judgment of the United States Court for the Southern District of the Indian Territory was affirmed.

That thereafter the said J. P. Ellis took an appeal from the judgment of the United States Court of Appeals for the Indian Territory to the United States Court of Appeals for the Eighth Circuit, and that said cause is in that court still pending.

That on the — day of —, 1899, said Theodore Fitzpatrick for a valuable consideration executed to the plaintiff J. E. Cross his quit-claim deed for said property, and afterwards the plaintiff R. M. Bourland bought from said Cross an undivided one half interest in said property, and that plaintiffs are the sole owners of the same.

That some time in the month of —, 1902, all the lots in the City of Chickasha were scheduled under the direction of Arthur W. Helley and Wesley B. Burney, townsite commissioners for the Chickasaw Nation and that after said town lots had been so scheduled the records of said townsite commissioners showed that said lot 3 in Block 46 had been scheduled as "in litigation."

That the part of said record showing that said lot was in litigation was afterwards abstracted from said record, and that the defendants F. E. Riddle and Matt Cook fraudulently procured said townsite commissioners to schedule and list said town lot to them. That the defendant F. E. Riddle is and has always been the attorney of the defendant J. P. Ellis in the litigation affecting the property herein described.

That said defendants F. E. Riddle and Matt Cook immediately after the commission of said fraud, forwarded to the defendant, J. Blair Shoenfelt the full appraised value of said lot, less the reduction allowed by law and demanded that he procure a deed from the defendants D. H. Johnson, G. W. Dukes, or the person authorized by the Choctaw and Chickasaw Nations to execute and deliver to the purchasers of town lots deeds to such lots, and that he return the same to them.

That said property is now in the hands of the defendants J. P. Ellis, Matt Cook and F. E. Riddle, who are the real defendants in interest and all of whom are wholly and totally insolvent.

That unless an injunction be granted great and irreparable injury will result to plaintiffs.

That defendants J. P. Ellis, Matt Cook, and F. E. Riddle continuously keep said property in litigation for no other purpose than to derive the rents from the same.

Wherefore plaintiffs pray that the said defendants D. H. Johnson, Governor of the Chickasaw Nation, G. W. Dukes, Principal Chief of

the Choctaw Nation, the person or persons authorized by the Choctaw Nations to execute and deliver deeds to the purchasers of town lots in the Choctaw and Chicksaw Nations, and J. Blair Shoenfelt, United States Indian Agent, be enjoined from executing or delivering to the defendants, J. P. Ellis, Matt Cook and F. E. Riddle, or their agents any deed or transfer of said town lot, and that said defendants, J. P. Ellis, Matt Cook and F. E. Riddle, be enjoined from receiving the same and from transferring by deed or otherwise said property to any other person; and plaintiffs further pray that a receiver be appointed to take charge of said property pending this and all other litigation affecting said property in which the parties herein are concerned and for other relief.

88 BEAVERS, SAYER & BEAVERS,  
*Attorneys for Plaintiffs.*

R. M. Bourland says that he is one of the plaintiffs in the above entitled cause and that the allegations therein set forth are true.

(Signed)

R. M. BOURLAND.

Subscribed and sworn to before me this the 15th day of July, 1902.

*Notary Public.*

Fourteenth. Plaintiffs further state that on the 29th day of September, 1902, being one of the regular days of the September, 1902, term of Court at Chickasha, they filed their general demurrer and answer to the petition in said cause No. 694, and which said demurrer is in the words and figures following, omitting the caption, to wit:

"Come now the defendants, Matt Cook, J. P. Ellis and F. E. Riddle, above named, and file their demurrer to plaintiffs' petition filed herein, and for such demurrer allege:

That said complaint is insufficient in law to entitle the plaintiffs to the relief sought and prayed for, or to constitute any cause of action against the defendants.

Wherefore they pray the judgment of the court.

A. C. CRUCE,

F. E. RIDDLE,

*Attorneys for Def'ts.*

Fifteenth. That on, to wit: the 3d day of October, 1902, being one of the regular days of the October term of court at Chickasha, said demurrer came on to be heard by the court and the same was by the court sustained, by order and judgment duly given and made, and the defendants were given until the next day to amend. Plaintiffs further state that said defendants failed to file any amended complaint or pleading in said cause, and that on, to wit: the 19th day of February, 1903, said cause was by the court dismissed as hereinafter more fully alleged. That said answer is in words and figures, with endorsements thereon, as follows, to-

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wit:

"Come now the defendants, F. E. Riddle, Matt Cook and J. P. Ellis, and for answer to plaintiffs' petition in equity filed herein state:

First. That yhey admit that Theo. Fitzpatrick in 1899 filed his complaint in the U. S. Court in unlawful detainer for Lot. 3 in Block 46, as shown by the original plat of the town of Chickasha, and at the October term thereof judgment was rendered in favor of said plaintiff for the possession of said lot.

Second. Defendants admit that thereafterwards said defendant J. P. Ellis appealed said case to the Court of Appeals for the Indian Territory, and that said cause was submitted at the — term thereof, and that on the — day of October, 1901, an opinion was rendered in said cause in which opinion the United States Court for the Southern District of the Indian Territory was affirmed.

Third. Defendants admit that said J. P. Ellis prosecuted his appeal or writ of error to the Circuit Court of Appeals for the 8th Circuit at St. Louis, and that said cause is now pending in said court.

Fourth. Defendants admit that said Theo. Fitzpatrick on the — day of April, 1899, executed a certain quit-claim deed of his interest in said lot to J. E. Cross and the said J. E. Cross executed his one half interest by quit claim deed to the plaintiff R. M. Bourland.

Fifth. Defendants admit that on the — day of —, 1902, all the lots in the City of Chickasha were scheduled and appraised by Arthur W. Hellsley and Wesley B. Burney, Townsite Commissioners for the Chickasaw Nation, and that said lot was b<sup>h</sup> the clerks of said commission scheduled as in litigation, temporarily.

Sixth. Defendants deny that part of the record showing said lot was in litigation was afterwards abstracted from said record and that defendants F. E. Riddle and Matt Cook fraudulently procured said townsite commissioners to schedule and list said lot to them.

Seventh. Defendant F. E. Riddle admits that he was attorney for defendant, J. P. Ellis, in said litigation.

Eighth. Defendants deny that said defendants F. E. Riddle and Matt Cook immediately after the commission of said fraud forwarded to the defendant, J. Blair Shoenfelt the full appraised value of said lot, as alleged; but admit that they, after said lot was scheduled and listed to them and notice served on them as required by law, that they had a right to purchase said lot at 62½% of the appraised value, forwarded said amount to said J. Blair Shoenfelt, at Muskogee, Indian Territory, in payment of the purchase price to the Government, and that by so doing said defendants, F. E. Riddle and Matt Cook, acquired legal and equitable title to said property.

Ninth. Defendants deny that all of said parties are insolvent as alleged, but admit that they are in lawful possession of said property. Defendants deny that unless an injunction is granted plaintiffs will suffer irreparable injury; deny that said defendants, as alleged, continuously keep said property in litigation for no other purpose than to derive the rents therefrom.

Wherefore defendants pray that said petition be dismissed and that they have their costs herein expended, and pray for such other



general and special relief as they may be entitled to in law and equity, and also further pray that said title to said lot be quieted to said defendants F. E. Riddle and Matt Cook.

A. C. CRUCE,  
F. E. RIDDLE,  
*Attorneys for Defendants.*

Personally appeared before me the undersigned F. E. Riddle who on oath states that he is one of defendants in the above entitled cause and that the facts and statements contained in the above answer are true.

(Signed)

F. E. RIDDLE.

Subscribed and sworn to before me this 29th day of Sept. A. D. 1902.

MAMIE DEVLIN,  
*Notary Public.*

Sixteenth. Plaintiffs further state that on the 19th day of February, 1903, being one of the regular days of the term of court at Chickasha, I. T., the defendants herein R. M. Bourland and J. E. Cross, appeared in person and in Open Court and by attorney voluntarily caused the dismissal of said suit in equity, as above referred to herein, and judgment of the court was duly given and made and entered in said cause, in words and figures as follows, towit:

"R. M. BOURLAND et al., Plaintiffs,  
vs.  
D. H. JOHNSON et al., Defendants.

*Judgment.*

Now at this time came on to be heard the above entitled cause, and plaintiffs appearing in person and by attorney, and the defendants, F. E. Riddle, Matt Cook and J. P. Ellis, appearing in person and by attorney, and after issues being joined herein plaintiffs in open court announced that they would not further prosecute said suit and desired to dismiss the same, and hereby in open court dismiss said complaint in equity.

It is therefore considered ordered and adjudged by the court that said petition in equity be and the same is hereby dismissed  
91 at plaintiffs' cost, and defendants have their costs herein expended, for all of which let execution issue."

Seventeenth. Plaintiffs state that the matters and things now set up as a defense by said defendants herein for the purpose of showing an equitable title in said property in them are the same matters and things set up in said bill in equity, as aforesaid, and all the facts now set up in their answer herein for the purpose of defeating plaintiffs' cause of action and for the purpose of showing an equitable title in said defendants within and to said property were alleged and

set up by said defendants R. M. Bourland and J. E. Cross and Mrs. Ella Cross in said suit in equity, as aforesaid, and were adjudged and determined against them and in favor of plaintiffs herein, and the said R. M. Bourland and J. E. Cross and Ella Cross have ever since said date been estopped and are now estopped from setting up any of said matters and things against the plaintiffs herein, and by reason of said facts and judgments the premises above described were determined and adjudged to be the property of plaintiffs herein and not the property of defendants herein.

Wherefore plaintiffs pray that the defendants H. B. & E. B. Johnson and the First National Bank Building Company, through its President, H. B. Johnson, be cited to answer herein and that on final hearing said plaintiff F. E. Riddle have judgment against said defendants and each of them for the possession of said lot and adjudging the title to said lot to be in said plaintiff F. E. Riddle

92 and divesting title from his co-plaintiff herein, and that he be adjudged and decreed to be the absolute owner of said lot and title to be quieted in him, and that he also have judgment for rents and damage in the sum of \$37.50 per month from the 1st day of February, 1903, until the 1st day of January, 1904, and that he have judgment against said defendants from the first day of January, 1904, in the sum of \$135.00 per month, together with a legal rate of interest thereon, and his costs, and prays for such other general and special relief as he may be entitled to in the premises.

A. C. CRUCE,  
W. A. LEDBETTER, AND  
F. M. BAILEY.

INDIAN TERRITORY,  
*Southern District, ss:*

Personally appeared before me the undersigned authority F. E. Riddle, who on oath states that the facts and statements contained in the above complaint are true to the best of his knowledge and belief.

Subscribed and sworn to before me this — day of —, 1906.

\_\_\_\_\_  
Notary Public.

And attached to said amended complaint as an exhibit is the following:



Department of the Interior.

United States — Service.

Townsite Commission for the Chickasaw Nation.

Indian Territory.

93     *Chickasha, I. T.:*

To Finis E. Riddle, Matt Cook:

You are hereby notified that this commission has appraised and scheduled to you improved property in the town of Chickasha, Chickasaw Nation, Indian Territory, as follows:

Lot No. 3, Block No. 46, Amt. of Appraisement, \$600.00 Per Cent, 62½.

Under the provision of the Agreement with the Choctaw and Chickasaw Nations, as ratified by the Act of Congress, approved June 28, 1898 (30 Stat. 495) you have the right to purchase the above described lots in the town named at the proper per cent of the appraised value as indicated.

The first payment of one fourth of the purchase price or 25 per centum of the amount due for each lot, must be made within sixty days from the date of the service of this notice and the remainder of the purchase money in the annual equal installments.

All such payments must be made to the United States Indian Agent, Union Agency, at Muskogee, Indian Territory.

If said first payment of 25 per centum is not made within sixty days from the date of service of this notice the property will be subject to sale at public auction to the highest bidder.

ARTHUR W. HEFLEY,  
WESLEY B. BURNEY,  
*Townsite Commission.*

*Acknowledgment of Service.*

Service of the above notice is hereby acknowledged at Chickasha, Indian Territory, this 12th day of June, 1902, at 8 o'clock, A. M.

FINIS E. RIDDLE &  
MATT COOK.

BERY C. L. JOHNSON, *Witness.*

(Exhibit A.)

Department of the Interior.

United States Indian Service.

Office of the United States Indian Agent.

Union Agency.

MUSKOGEE, INDIAN TERRITORY, June 28, 1902.

Finis E. Riddle, Matt Cook, Chickasha, I. T.

SIRS: I acknowledge receipt of your remittance of \$375.00 the same being the full payment on lot 3 in Block 46, in the town of Chickasha, Indian Territory, as per the statement accompanying remittance.

Very respectfully,

J. BLAIR SHOENFELT,  
U. S. Indian Agent.

And endorsed on the back of the foregoing 2d Amended Complaint of plaintiffs appears the following: Filed in Open Court, —, 1906. C. M. Campbell, Clerk.

95 And thereafter, to wit, on the 19th day of August, 1907, plaintiffs filed in said court their Supplemental Complaint which said supplemental complaint is in the words and figures following, to wit:

*Plaintiffs' Supplemental Complaint.*

In the United States Court in and for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE, Plaintiff,

vs.

ELLA CROSS, R. M. BOURLAND, E. B. JOHNSON, H. B. JOHNSON and  
FIRST NATIONAL BANK BUILDING CO., Defendants.

Now comes F. E. Riddle, plaintiff in the above styled cause, and moves the court for permission to file herein this his supplemental complaint and alleges that since the filing of the first amended complaint herein, the title of the plaintiff- Matt Cook and F. E. Riddle to the lot described in the First Amended Complaint has matured into a perfect title and patent to said lot has been duly executed by the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation, which patent is hereto annexed marked "Exhibit A" and made a part of this supplemental complaint, said patent has been duly and legally issued and executed in accordance with the laws and treaties governing the issuance of patents in the Indian Territory, and that said patent, in accordance with the laws and treaties has been delivered to the said Matt Cook and

The said F. E. Riddle, plaintiff herein, further alleges that since the institution of this suit he has purchased the interest of the said Matt Cook in and to the lot in controversy herein and the said Matt Cook has by an instrument in writing conveyed all his right, title, claim and interest in and to said lot to the said F. E. Riddle, a copy of which in hereto annexed marked "Exhibit B" and made a part of this supplemental complaint.

Wherefore, the said F. E. Riddle prays that he be permitted to file this supplemental complaint and that on the final hearing he have judgment for said premises together with all the rents and revenues arising therefrom and interest thereon and costs of suit.

W. A. LEDBETTER,  
A. C. CRUCE,  
FRANK M. BAILEY,  
*Attorneys for Plaintiff.*

INDIAN TERRITORY,  
*Southern District:*

F. E. Riddle, being duly sworn, deposes and says on oath that the statements contained in the above and foregoing supplemental complaint are true according to his belief.

F. E. RIDDLE.

MAMIE DEVLIN,  
*Notary Public.*

My commission expires Mar. 8, 1910.

97 Attached to said Supplemental Complaint is the following Exhibit:

Choctaw and Chickasaw Nations.

Record —, Page —.

Town Lot Patents.

Dated —.

Dated —.

Filed —.

Cons. \$ —.

To all to whom these presents come, Greeting:

Recites: That, Whereas a certain townsite commission, heretofore appointed, and acting in accordance with law, has appraised the lots in the town of Chickasha, Chickasaw Nation, Indian Territory; and

Whereas, the plat of said town was approved by the Secretary of the Interior on the 11th day of December, 1901, and was duly placed on file; and

Whereas, the said commission has awarded the real estate described hereinbelow to Finis E. Riddle & Matt Cook, who has deposited Three Hundred & Seventy Five Dollars, the full amount of the purchase price, with the United States Indian Agent at Muskogee, Indian Territory, and is, therefore, entitled to a patent:

Now, therefore, we, the undersigned, Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, do, by virtue

of the power and authority vested in us by the twenty-ninth section of the act of Congress of the United States, approved June 28th, 1898, (30 Stat. 495) and the act of Congress of July 1, 1902 (32 Stat. 641) hereby grant, sell, and convey unto the said Finis E. Riddle & Matt Cook, heirs and assigns forever, all the right title and interest of the Choctaw and Chickasaw Nations aforesaid 98 in and to lot numbered 3 in block 46, in the town of Chickasha, Chickasaw Nation, Indian Territory, and according to the plat thereof on file as aforesaid.

In Witness Whereof, we, the principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective nations to be affixed at the dates hereinafter shown.

[SEAL.]

GREEN McCURTAIN,

*Principal Chief of the Choctaw Nation.*

Date May 13, 1907.

[SEAL.]

DOUGLASS H. JOHNSON,

*Governor of the Chickasaw Nation.*

Date May 18, 1907.

Endorsed on back: Patent: Choctaw & Chickasaw Nations to Finis E. Riddle and Matt Cook. Lot No. —, Block No. —, Town of Chickasha, Ind. Ter. Chickasaw Nation. Book 19, p. 484 on 23rd day of May, 1907, at 2 o'clock P. M. Tams Bixby, Commissioner, by Hal Bedford.

And on the back of said Supplemental Complaint and exhibit attached thereto appears the following endorsement: Filed in open court. Aug. 19, 1907. C. M. Campbell, Clerk.

99 And afterwards, to wit, on the 20th day of August, 1907, defendants filed in said court their Answer to Plaintiffs' Supplemental Complaint and Cross Complaint, which is in the words and figures following, to wit:

*Defendants' Answer to Plaintiffs' Supplemental Complaint and Cross-Bill.*

In the United States Court within and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now come the defendants and without waiving their demurrers but still insisting upon the same, and for answer in the above cause, admit that the plaintiffs have obtained an issuance to them of the patents to the land sued for but defendants deny that said patents transfer any real right upon the plaintiff- to the land in controversy. Defendants deny that the plaintiffs are entitled to judgment for the land or for any rents.

Defendants show that the patent issued to the plaintiffs was issued through a mistake of law on the part of the Department brought about and induced by plaintiffs as will more fully appear by defendants' cross-complaint herein and that the plaintiffs hold said patent in trust for these defendants, all of which will more  
100 fully appear by reference to plaintiffs' cross-complaint filed herewith.

BOND & MELTON &  
C. C. POTTER,  
*Att'ys for Def'ts.*

*Cross-complaint of the Defendants H. B. & E. B. Johnson.*

Now come the defendants and by way of cross complaint in equity respectfully show to the court that from the year 1892 to April 8th, 1899, one Theodore Fitzpatrick was the owner of the lot in controversy and was in the quiet and peaceable possession of the same, holding it by such title as white men could then hold lots in towns and cities of the Indian Territory; that on the 8th day of April, 1899, the said Theodore Fitzpatrick, joined by his wife, Maria Fitzpatrick, for a valuable consideration, bargained, sold and conveyed all his interest in said lot and property to the defendants Mrs. Ella Cross, a copy of which conveyance is hereto attached and marked "Exhibit A" and made a part of this cross-complaint. That thereafter on the 18th day of September, 1900, the said Mrs. Ella Cross joined by her husband J. E. Cross sold and conveyed an undivided  $\frac{1}{2}$  interest in said property for a valuable consideration to the defendant R. M. Bourland, a copy of which transfer is hereto attached and marked "Exhibit B" and made a part of this cross-complaint. That thereafter on the 15th day of May, 1903, the said Cross and Bourland for a valuable consideration bargained and sold said property to the defendants H. B. and E. B. Johnson, a copy of which deed is hereto attached and marked "Exhibit C" and made a part of this cross-complaint.

101 In about the year 1897 the said Fitzpatrick leased and demised said lot to one J. P. Ellis, the tenancy to run from month to month, for a monthly rental of \$5.00 per month. That the said Ellis entered upon said property under said lease contract and paid rent for a few months and then ceased paying and refused to pay and denied and disputed the right and title of his landlord, the said Theodore Fitzpatrick, to said property. In July, 1898, the said Fitzpatrick instituted suit in the United States Court for the Southern District of the Indian Territory, at Chickasha, against the said Ellis to recover possession of said lot, which action was an action of unlawful detainer. A copy of the amended complaint of the said Fitzpatrick in said suit is hereto attached and marked "Exhibit D" and made a part of this cross-complaint. To this complaint the said Ellis filed an Amended Answer, a copy of which is hereto attached and marked Exhibit "E" and made a part hereof. That upon the issues made and presented by these pleadings the case was tried in said court on the 20th day of August,

1900, and judgment was rendered therein for the said Fitzpatrick against the said Ellis for the possession of said property and for \$150.00 damages, the same being the rental value of said property during the time it was unlawfully occupied by the said Ellis. A copy of said judgment is hereto attached and marked Exhibit "F" and made a part of this cross-complaint. From this judgment the said Ellis appealed said cause to the United States Court of Appeals for the Indian Territory, at South McAlester, which  
102 court, on the 4th day of August, 1901, affirmed said judgment, and thereupon the said Ellis appealed to the United States Circuit Court of Appeals for the 8th Circuit, at St. Louis, which latter court, on the 27th day of October, 1902, affirmed the judgment of the courts below and issued its mandate to the trial court to enforce the judgment and in Feb. 1903, the said Cross and Bourland, the grantees of the said Theodore Fitzpatrick were duly placed in possession of said property and the said J. P. Ellis ejected therefrom by writ of restitution issued on said judgment in the United States Court for the Southern District of the Indian Territory, at Chickasha and in obedience to the mandate of the Higher Court. That the transfer from the said Theodore Fitzpatrick to Mrs. Ella Cross and the transfer from Mrs. Cross and her husband to the said R. M. Bourland were made pending said suit brought by the said Fitzpatrick against the said J. P. Ellis for the possession of said lot, but at the time of said transfers it was understood and agreed between the parties that the said Theodore Fitzpatrick should continue to prosecute said suit for the benefit of his grantees, and he did so continue to prosecute said suit in his own name, but for the benefit of his grantees who, by reason of said agreement and understanding and by reason of said transfers, became the beneficiaries of said judgment and of all the rights, benefits, advantages and privileges acquired thereby in the name of the said Fitzpatrick.

That when the said Cross & Bourland became the purchasers of said property they paid a valuable consideration  
103 therefor and without any notice or knowledge that the said Ellis claimed any ownership in the improvements on said lot separate and distinct from his alleged ownership of said lot.

These defendants further show that all the rights the plaintiffs ever acquired in and to said property was by purchase from said J. P. Ellis, which purchase and transfer were made while the said litigation between Fitzpatrick and Ellis for the possession of said lot was pending, and of which said plaintiffs had both constructive and actual notice. That all the interest and right the said J. P. Ellis ever had in and to said lot he acquired by reason of the rental contract with the said Theo. Fitzpatrick, heretofore set out, and other than this he had no claim, right, interest or possession in said property. That when the said J. P. Ellis prosecuted appeals from the judgments of the various courts against him and in favor of Fitzpatrick, as aforesaid, he executed supersedeas bonds, thereby keeping and continuing the wrongful possession of said property, and thereby wrongfully keeping the said Fitzpatrick and his grantees from the possession of said property.

These defendants further show that the plaintiffs claimed the right to purchase the property in controversy under the laws of Congress, providing for the platting and the sale of townsites in the Indian Territory solely upon the ground that they had

104 purchased the rights of J. P. Ellis in and to said property and claiming by said purchase that they acquired the ownership of certain improvements thereon.

These defendants further show that the said Fitzpatrick, prior to the transfer of his interest in said lot to Bourland and Cross, hereinbefore set out, claimed the preference right to purchase said lot by reason of his ownership and possession thereof, and by reason of the improvements then situated thereon, but not knowing that such improvements would be sufficient to confer the preference right of purchase upon him to purchase the same as an improved lot, as the Department had not then defined, as it did later, what it would consider valuable and permanent improvements within the meaning of the law, and for that reason the said Fitzpatrick desired and expected as soon as he could get possession of said lot to erect other and additional improvements on the same so that it would clearly bring him within the meaning of the law as one having the preference right of purchase by reason of having placed valuable and permanent improvements, other than fencing and tillage, on the lot. That after the transfer to the defendants Cross and Bourland they claimed the preference right to purchase said lot as an improved lot under the Act of Congress relating to the platting and selling of townsites in the Indian Territory and *to the platting and selling of townsites in the Indian Territory and* the Atoka Agreement by reason of their ownership of the lots and the improvements on the same and also upon the additional grounds that they had placed  $\frac{1}{2}$  of a valuable brick wall on said lot, the facts in relation to which are more fully set out in another part of this cross-complaint. That plaintiffs and defendants were claiming the preference right to purchase said lot as an improved lot upon the respective grounds above set forth when the townsite commission came to Chickasha in Feb. 1902, for the purpose of platting, appraising and scheduling the lots thereof. That it was then and had been for a long time the custom of the townsite commission, where there was litigation in regard to the ownership of lots, not to schedule them to either party, but merely to mark them as "in litigation," awaiting the determination of the controversy in the courts. That soon after the town site commission arrived in Chickasha, the defendants, Cross and Bourland procured the lot in controversy to be scheduled as in litigation, thinking that it would not be right or proper that it should be scheduled to either party until the litigation was settled. That afterwards without giving any notice to the defendants, and without any knowledge on their part, the plaintiffs procured the townsite commission to change the scheduling of said lot and scheduled the same to them as persons who had the preference right to purchase the same as an improved lot, and in great haste, and before the defendants had any



knowledge of the same, the plaintiffs also paid the full amount at which said lot was appraised to the Government.

106 That as soon as the defendants, Cross & Bourland, learned that said lot had been scheduled to the plaintiffs they immediately entered protest in the Department protesting against the rights of the plaintiffs to become the preference right purchasers of said lot and claiming the right in themselves. That out of said protest and conflict there arose a contest in the Department between the pl't'ffs as contestees and the defendants, H. B. & E. B. Johnson as contestants, in which the Interior Department awarded to the plaintiffs the right to purchase said lot and issued to them the patent, a copy of which is attached to pl't'ffs' amended complaint herein. Copy of the ruling, findings and opinion of the Department in said contest is hereto attached and marked Exhibit "G" and made a part hereof. But these defendants respectfully show that in awarding to the plaintiffs the right to purchase and the issuance of the patent to them, the Department made several mistakes and errors of law, and misconstrued the law relating to the rights of the parties, and made several mistakes and errors in the application of principles of law to the facts arising in the case, which errors and mistakes are as follows:

1st. The department erred as a matter of law in holding that the right to purchase improved lots under the Act of Congress relating to the platting and sale of town lots in the Ind. Ter. conferred the right to purchase upon a tenant who had placed improvements on the property rented and not upon the landlord.

107 2d. The Department erred as a matter of law in holding that the said J. P. Ellis, prior to his sale and transfer to the plaintiffs, had not forfeited his ownership of any improvements which he or his grantor may have placed on said lot, by his denial of an- repudiation of his lease and his landlord's title to the property, both before the suit was brought against him by Fitzpatrick and pending said suit.

3d. The Department erred as a matter of law when it held that the improvements placed on said lot by the said Ellis and his grantor on said lot did not pass to and become the property of Fitzpatrick and his grantees by reason of the repudiation by Ellis of the relation of Landlord and Tenant between himself and Fitzpatrick, and by reason of his refusal and failure to remove said improvements at the expiration of his lease, or within a reasonable time thereafter.

4th. The Department erred as a matter of law in holding that Fitzpatrick, in his pleadings in the forcible entry and detainer case, manifested a purpose not to claim the ownership of the improvements, but still to consider the said Ellis the owner thereof, notwithstanding such forfeiture, and thereby waived the forfeiture to him of said improvements.

5th. The Department also erred as a matter of law in holding that the judgment in the case of Fitzpatrick vs. Ellis did not ad-  
judge that Fitzpatrick and his grantees were the owners and  
108 entitled to the possession of the improvements along with the possession of the land.



6th. The Department erred in holding that Ellis continued to be the owner of the improvements on said land after the rendition of said judgment.

7th. The Department erred in holding that J. P. Ellis could make use of his wrongful possession of said lot to acquire the right to purchase the same as an improved lot, thereby rewarding him for his wrongful and unlawful act and permitting him to take advantage of his own wrong.

8th. The Department erred in holding and deciding that a party without right could wrongfully and unlawfully hold possession of a vacant lot by entering thereon and thereby excluding the lawful owner from his rightful possession and preventing him from placing improvements thereon, and could, by placing improvements thereon himself, acquire the right to purchase the lot as an improved lot to the exclusion of the said rightful owner.

9th. The Department also erred in the construction and application of the law in holding and deciding that the Act of Congress providing for the platting and sale of townsites in the Indian Territory, and the Atoka Agreement, destroyed the relation of landlord and tenant between Fitzpatrick and Ellis and enabled Ellis to avail himself of his possession under a lease contract to defeat all the rights of Fitzpatrick in and to said lot.

10th. The Department also erred in construing and applying the law in this case in holding and deciding that the rights of parties to purchase town lots as improved property under the said Act of Congress, and Atoka Agreement, were fixed and determined immediately upon the passage of the Act, instead of the facts and rights surrounding the property and existing at the time the property was actually platted and scheduled.

11th. The Department also erred in its construction and application of the law in holding and deciding that the defendants herein were estopped from denying and disputing the ownership of the said plaintiffs to the said lot, because, in January 1902, the defendant H. B. Johnson had entered into an agreement with said Ellis in reference to certain uses of portions of said lot for the reason that no alleged construction of said instrument could properly give it any such effect.

12th. The Department further erred in not permitting these defendants to introduce parole evidence of the contents of the lost written instrument relating to the construction of the division wall of the brick house, one half of which was placed on the lot in controversy, and in refusing to consider said evidence. This evidence would have shown that before the lot was scheduled to anyone that valuable and permanent improvements were placed thereon by the defendants Bourland and Cross, other than fencing and tillage, which improvements would have given them the right to purchase said lot as an improved lot. The facts in relation to rejecting said evidence and in relation to said written instrument are more fully set out at another place in this cross-complaint.

These defendants further show that the Department did decide all the different questions, as above pointed out, in favor of

the plaintiffs herein and against the defendants herein. These defendants show that the law on each of said issues was and is in favor of these defendants and should have been so decided. Defendants allege the fact to be that if while the said Ellis was in possession of said property, holding the same as the tenant of the said Theo. Fitzpatrick, he did place improvements on said lot which were sufficient under the rulings of the department to entitle the rightful owner of said improvements to purchase said lot as an improved lot under the Act of Congress relating to the platting and selling of town lots in the Indian Territory; that his ownership of said improvements only entitled him to remove same, if any such ownership he had; these defendants allege that the said Fitzpatrick being then the rightful owner of said lot, and this possession by the said Ellis and his grantor having been acquired through and under Fitzpatrick by lease, as above set out, that said improvements when placed upon said property became the property and improvements of the said Fitzpatrick. That if this were not the case, that when said Ellis repudiated, disputed and denied his lease contract with the said Fitzpatrick, which he did do, and that when he disputed and denied the right and title of the said Fitzpatrick to said lot, as he did do, and when he also failed and refused to remove said improvements from said property at the expiration of

111 said lease, or within a reasonable time thereafter, all of which he did, said improvements at once became the property and improvements of the said Theo. Fitzpatrick, and he, thereby, and his grantees thereafter acquired the right under the Act of Congress to become the purchasers of said lot as improved property.

These defendants further show that the judgment in the case of Fitzpatrick vs. Ellis for the possession of said lot not only conclusively established the lease contract alleged in plaintiff's complaint in said cause, but it conclusively decided and determined that Fitzpatrick and his grantees had the right to the possession of said lot and the improvements thereon; and it also conclusively determined that Fitzpatrick and his grantees were the owners of said lot and the owners of the improvements thereon as against the said Ellis and his grantors and were entitled to the immediate possession thereof.

These defendants further allege that if they are in error about the judgment of the court in said cause of Fitzpatrick vs. Ellis actually deciding that Fitzpatrick and his grantees were the owners of said improvements, then they allege that said judgment estops the said Ellis and his grantors from asserting any ownership in said improvements, or any rights whatever to said lot, because they say that

112 the said Ellis by his pleadings in said cause treated the right to the possession of said lot and the right to the possession of the improvements thereon as belonging to one and the same person, and he did not claim any right to remove said improvements from said lot, or did not claim any ownership of said improvements distinct from the ownership of said lot, and it was his duty if he had any such ownership of said improvements distinct from the ownership of said lot, if he had desired any rights reserved to him in reference to said improvements, either to occupy or remove the same,

he should have pleaded such right in said suit, and by failing to do so, he and his grantors are forever estopped and precluded from asserting said rights against the said Fitzpatrick and his grantees.

These defendants further show that by the wrongful failure and refusal of the said Ellis to vacate said lot and by his wrongful refusal to permit the said Fitzpatrick and his grantees to enter upon said lot, he made it impossible for the said Fitzpatrick and his grantees to enter upon said lot and place the improvements thereon, such as would entitle them independent of any improvements thereon claimed by the said Ellis and his grantor to confer upon them the right to purchase the lot as an improved lot. That said Ellis sought by his own wrong to deprive the said Fitzpatrick and his grantees of their lawful and equitable right to purchase said lot as an improved lot, and to wrongfully and unlawfully acquire this right for himself, and the effect of the action of the department in awarding title to said lot to the plaintiffs is to uphold and abet said wrong, contrary to law and the rights of the defendants.

113 These defendants show that on or about the — day of —, 1902, and while the litigation between Fitzpatrick and Ellis in reference to the possession of said lot was still pending and before the same had been scheduled to anyone, and after Bourland and Cross had become the owners thereof by purchase from Fitzpatrick, these defendants then owning an adjoining lot to the lot in controversy, and just east of the same, desired to erect a brick building on their lot and as is customary desired to put the west wall of their house on the line between the two lots, constructing the wall so that  $\frac{1}{2}$  of it would be on the west side of said division line and  $\frac{1}{2}$  of it on the east side of said division line, so that the owners of the lot in controversy should own that part of said wall placed on said lot. As the ownership of said lot was then in dispute and litigation between said Bourland and Cross, as grantees of Fitzpatrick, and the said Ellis, and it was not known how said case would finally be decided, the defts. H. B. and E. B. Johnson, and the said Bourland and Cross and the said Ellis entered into a mutual written contract by which it was agreed that the said H. B. & E. B. Johnson might so construct said brick wall, but that  $\frac{1}{2}$  of the cost of construction of the same should be paid by the successful party in said suit who would thereby become the owner of that half of said wall so placed on said lot; the said Ellis therein and thereby treating, as he had always done, the right to said lot and improvements thereon one and inseparable. That acting under this contract the said H. B. and E. B. Johnson constructed said wall at a cost of \$1200. That upon the final decision of said case of Fitzpatrick vs. Ellis, in favor of Fitzpatrick, and the placing of the said Bourland and Cross in possession of said lot, under said judgment, the said Bourland and Cross paid these defendants for the  $\frac{1}{2}$  of the cost of the construction of said wall, in the following manner: When these defts purchased said lot from the said Bourland and Cross, the  $\frac{1}{2}$  of the construction of said wall was deducted from the purchase money which would have been due then for said lot, and in that way and only in that way did these defts ever receive pay for  $\frac{1}{2}$  of the cost of the construction of said brick wall.

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These def'ts further show that said contract, while in writing, has been lost or mislaid and cannot be found, and they further show that when the commissioner (sent out by the department to take the evidence in the contest in reference to said lot) came to Chickasha to take the testimony, these defendants introduced evidence before said commissioner sufficient in law to justify the admission of parole evidence of the contents of said instrument, and these defendants at said hearing offered parole evidence of the contents of said instrument, but the said commissioner rejected and excluded such evidence and thereby, through an erroneous and mistaken construction and application of the law, the defendants were deprived in said hearing before the commissioner of this valuable and important testimony,

the same being excluded upon the objection made by the  
 115 plaintiffs herein, which objections were by the said commissioner sustained and no report thereof was made by him to the department so that the higher officers in the department could review his said action. That the probative effect of said evidence was to show that said Ellis considered and treated the right to the possession of said lot and the possession of the improvements thereon to be one and the same right and that they must necessarily remain inseparable and belong to the same person. It also showed that the said Bourland and Cross, owning and claiming said lot under the Fitzpatrick title, placed permanent and valuable improvements thereon, which of itself would have entitled them under the law to purchase the same as improved property, said improvements being placed thereon long before the right to purchase said lot was awarded to the plaintiffs herein.

Defendants further show that pending the litigation between Fitzpatrick and Ellis in reference to said lot and while the said Ellis was in possession of the same, holding such possession under the supersedeas bonds aforesaid, these defendants, E. B. and H. B. Johnson, got permission in writing from the said Ellis to erect some outhouses on said lot for temporary use, which writing was introduced in evidence by the contestants in said contest (the plaintiffs herein) that the Department under a misconstruction of law held and considered the said writing as important evidence against the  
 rights of these defendants to purchase said land and gave  
 116 great weight to the *the* same in its decision and considered it as in some way estopping these defendants from claiming the right to purchase the land under Fitzpatrick's chain of title. These defendants show that they never were in possession of said lot, nor never asserted the right to the possession of said lot until they purchased the same under the Fitzpatrick title. That the agreement as to the outhouses created a mere easement at best.

These defendants further show that all of the facts above set out were proved and established in said contest and were practically undisputed by the plaintiffs and were considered as fully proven by the Department in deciding said controversy and awarding the right to purchase to the plaintiffs herein, except as to the contract in reference to the division wall, which was not considered at all, for the reasons above set forth, and said patent and said title and the right to

purchase said land should have been awarded on said facts to these defendants H. B. and E. B. Johnson, and would have been so awarded but for the mistakes and misconstructions of the law in applying the same to said facts, as hereinbefore specifically set forth.

These defendants further show that having become the owners of said lot for a valuable and adequate consideration by purchase from the persons in possession of the same and from parties placed in possession of said lot by decree of the court and holding the same by virtue of the decision and judgment of the court, they in good faith and honestly believing that they were the rightful owners of said lot placed and erected on said lot a two story brick house at a cost of \$7,500.00, which is permanent and has increased the value of said lot at least \$9,000.00. That said house is now worth \$9,000 and said improvements far exceed the rental value of said lot during the time it has been occupied by the defendants H. B. and E. B. Johnson or their grantees, Cross and Bourland, which improvements were made before the decision of said contest.

Wherefore, these defendants show that they are the owners of said lot, and had the law been properly construed and applied by the department upon the testimony before it and the testimony that should have been before it and would have been but for the errors of the said department brought about by the action of the plaintiffs herein, the patent to said lot would have been awarded and issued to these defendants. That they are the equitable owners and holders and in possession of said property and that the plaintiffs hold the legal title evidenced by said patent in trust for these defendants, and these defendants now here tender in the court for the plaintiffs \$495.95, it being the full amount of the appraised value of the said lot paid by the plaintiffs, together with 6% interest thereon from date of payment to this date. And they pray for a decree of this court quieting their title and possession to said lot and decreeing whatever title which may be vested in the plaintiffs by the issuance of said patent be divested out of them and vesting the same in these defendants, and for all such other and further relief as they may show themselves entitled to in the premises. But should it be decided that these defendants have not the right to have the title to said lot decreed to them by the court, then they pray that they be allowed pay for their improvements aforesaid, that the value of said improvements be offset against any rents that the defendants may be adjudged to owe plaintiff, and that they have judgment against the plaintiffs for the remainder of said rents, and that they be permitted to remain in the possession of said property until said improvements are paid for, and for general relief.

BOND & MELTON AND  
C. C. POTTER,  
*Attorneys for Defendants.*

I, H. B. Johnson, one of the defendants in the above cause do on oath state that I believe that the matters and things set forth in the above and foregoing cross bill are true.

H. B. JOHNSON.

Sworn and subscribed to before me Aug. 20th, 1907.

[SEAL.]

C. M. CAMPBELL, *Clerk*,

By G. L. SCOFFERN, *Deputy*.

Attached to the foregoing cross-bill are the following exhibits:

#### EXHIBIT A.

Know all men by these presents that we, Theodore Fitzpatrick and Maria Fitzpatrick, husband and wife, of Bradley, I. T. in consideration of the sum of five hundred dollars to us in hand paid by  
119 Mrs. Ella Cross, of Chickasha, I. T., the receipt of which is hereby acknowledged, do hereby remise, release and forever quit-claim unto the said Mrs. Ella Cross, all that tract or parcel of land described as follows: Lot No. 3, in Blk. No. 46, on Chickasha Ave., in the town of Chickasha, in the Southern District of the Indian Territory.

To have and to hold the aforegranted premises together with all the privileges and appurtenances thereto belonging to the said Mrs. Ella Cross, her heirs and assigns, to their use and behoof forever.

And we do hereby for ourselves and our heirs, executors and administrators, covenant with the said grantee and her heirs and assigns, that the granted premises are free and clear from all incumbrances made or suffered by us, and that we will each for our heirs, executors, administrators or assigns defend the same to the said grantee, her heirs and assigns forever, against the lawful claims and demands of all persons, by, through or under us or either of us.

In witness whereof we have hereunto set our hands this the 8th day of Apr. 1899.

THEO. FITZPATRICK.  
MARIA FITZPATRICK.

In the presence of  
C. M. FECHHEIMER.  
A. W. BOHART.

INDIAN TERRITORY,  
*Southern District:*

120 On this the 8th day of April, 1899, before me, a Notary Public, within and for the Southern District of the Indian Territory, appeared in person Theo. Fitzpatrick, to me personally known as the person whose name appears upon the above deed of conveyance as one of the parties grantors, and stated that he had executed the same for the considerations and purposes therein set forth. And I do so certify.

And I further certify that on this day coluntarily appeared before me Maria Fitzpatrick, wife of the said Theo. Fitzpatrick, to me well known to be the person whose name appears on the above deed, and in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed and for the purposes therein contained and set forth without compulsion or undue influence of her said husband.



In testimony whereof, I have hereunto set my hand and notarial seal at Chickasha, Ind. Ter. on the 8th day of Apr. 1899.

CHAS. M. FEICHERIMER,  
Notary Public.

### EXHIBIT B.

Know all men by these presents that we, J. E. Cross and Ella Cross, his wife, for and in consideration of the sum of one dollar, to *them* paid by R. M. Bourland do hereby grant and sell and  
121 quitclaim unto the said R. M. Bourland, and unto his heirs and assigns forever, the following lands lying in the town of Chickasha, I. T. towit: An undivided  $\frac{1}{2}$  interest in Lot 3, in Block 46, on Chickasha Ave. in the town of Chickasha, Southern District of the Indian Territory.

To have and to hold unto the said R. M. Bourland and unto his heirs and assigns forever, with all appurtenances thereto belonging. And I do for myself, my heirs, executors and administrators, covenant with the said grantees and his heirs and assigns, that the granted premises are free clear and discharged of and from all encumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through or under me.

And I, Ella Cross, wife of the said J. E. Cross, for and in consideration of said sum of money, do hereby release and relinquish unto the said R. M. Bourland all my right of dower in and to said lands.

Witness our hands this the 18th day of September, 1900.

ELLA CROSS.  
J. E. CROSS.

INDIAN TERRITORY,  
*Southern District:*

122 Be it remembered that on this day personally came before me, the undersigned, a Notary Public, in and for the Southern District of the Indian Territory, duly commissioned and acting, J. E. Cross, to me known as grantor in the foregoing deed, and stated that he had executed the same for the purposes and considerations therein expressed and set forth.

And on the same day also voluntarily appeared before me the said Ella Cross, wife of the said J. E. Cross, to me well known, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the consideration and purposes therein mentioned and set forth, and without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this the 18th day of Sept. 1900.

[SEAL.]

CHAS. M. FECHHEIMER,  
Notary Public.

My commission expires Nov. 8th, 1900.

## EXHIBIT "C."

*Quit-claim Deed.*

Know all men by these presents: That we, J. E. Cross, and R. M. Bourland, and our wives, Ella Cross and Millie F. Bourland, for and in consideration of the sum of Five Thousand Dollars, to us paid by E. B. Johnson and H. B. Johnson, do hereby grant, sell and quit-claim unto the said E. B. Johnson and H. B. Johnson, and unto their heirs and assigns forever, the following land in the Indian

Territory and city of Chickasha, towit:

123 All of Lot Three (3) Block Forty-six (46), together with all improvements situated thereon, according to the Government plat of the city.

To have and to hold the same unto the said E. B. Johnson and H. B. Johnson, and to their heirs and assigns forever, with all the appurtenances thereto belonging.

And I, do hereby, for myself, and my heirs, executors and administrators, covenant with the said grantees and *his* heirs and assigns that the granted premises are free from all incumbrances made or suffered by me, and that I will and my heirs, executors and administrators shall warrant and defend same to the said grantee- and *his* heirs and assigns forever against the lawful claims and demands of all persons claiming by, through or under me. And we, Ella Cross and Millie Bourland, wives of the said J. E. Cross and R. M. Bourland, for and in consideration of said sum of money do hereby release and relinquish unto the said E. B. Johnson and H. B. Johnson all *my* right of dower in and to said lands.

Witness our hands and seals this the 25th day of May, 1903.

J. E. CROSS.	[SEAL.]
ELLA CROSS.	[SEAL.]
R. M. BOURLAND.	[SEAL.]
MILLIE BOURLAND.	[SEAL.]

*Acknowledgment.*

TERRITORY OF OKLAHOMA.

*Caddo County:*

124 Be it Remembered that on this day came before me the undersigned W. H. Yeager, a Notary Public, within and for the County aforesaid, duly commissioned and acting J. E. Cross, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day voluntarily appeared before me the said Ella Cross, wife of the said J. E. Cross, to me well known, and in the absence of her said husband, declared that she had of her own free will, signed and sealed the relinquishment of dower in the foregoing deed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.



Witness my hand and seal as such notary public on this the 20th day of May, 1903.

[SEAL.]

W. H. YEAGER,  
*Notary Public.*

My commission expires August 6th, 1906.

INDIAN TERRITORY,  
*Southern District:*

On this the 26th day of May, 1903, personally came R. M. Bourland, known to me to be the person who executed the foregoing instrument and stated and acknowledged to me that he had executed the same for the purposes and consideration therein mentioned and set forth. And I do so certify.

[SEAL.]

ALGER MELTON,  
*Notary Public.*

125 STATE OF TEXAS,  
*County of Montague:*

Be it remembered, that on this day voluntarily appeared before me, Levy Baker, a Notary Public, in and for Montague County, State of Texas, duly commissioned and acting, Mrs. Millie Bourland, wife of R. M. Bourland, one of the grantors in said conveyance, to me well known as the person signing said deed, and in the absence of her said husband declared to me that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on the 27th day of May, 1903.

[SEAL.]

LEVY WALKER,  
*Notary Public, Montague County, Texas.*

126 EXHIBIT D.

In the United States Court for the Southern District of the Indian Territory, Sitting at Chickasha.

THEO. FITZPATRICK, Plaintiff,

vs.

J. P. ELLIS et al., Defendants.

*Second Amended Complaint.*

Now comes Theo. Fitzpatrick, plaintiff herein, and by permission of the court first had and obtained, files this his amended complaint, and says:

That on or about the — day of —, 1897, by a verbal lease made on said date, at Chickasha, Indian Territory, with J. P. Ellis, one of the defendants herein, leased, demised and let unto the said Ellis the premises situated, lying and being in the town, as shown

by the original plat thereof, a copy of which is now in the office of Beavers and Sayer, in said town, to have and to hold the said premises to the defendant for the term of one month, and from month to month thereafter, until terminating at the option of either party, or by the failure of said lessee to pay rent therefor according to the terms thereof, at the monthly rental of Five Dollars per month, payable monthly in advance. That by virtue of the said lease said defendant went into the possession of said premises, he and those under him paid rent thereunder, and he and those under him still continue to hold and occupy the same.

127 That notwithstanding repeated demands have been made by the plaintiff of the defendant, they have refused and neglected to pay the rent due upon said premises from the 1st day of April, 1898, according to the terms and conditions of said lease, but that said defendants held over and continued in possession of said premises without the permission of said plaintiff and contrary to the terms of said lease.

That at the time of entering into said lease aforesaid, was in the peaceable possession of said premises, and is now entitled to the same. That plaintiff, since the termination of the term for which the premises were demised, as aforesaid, did, to wit, on the 2d day of July, 1898, make a demand in writing of said defendants (a copy of which is hereto attached as a part of the original complaint filed herein and marked Exhibit A and made a part of this amended complaint) to deliver up and surrender to plaintiff the possession of the said premises.

That notwithstanding said notice, said defendants have failed and refused and neglected, and still refuse and neglect to quit and deliver up the possession of said premises, contrary to the form of the statute made and provided in such cases.

That there is still due plaintiff as delinquent rents upon said premises from the defendants the sum of Five Dollars per month from the 1st of April, 1898, that the monthly rental value of said premises is Five Dollars. That by Act of Congress passed

128 July 1st, 1898, entitled "An Act for the protection of the people of the Indian Territory and for other purposes" provision is made for the adjustment of titles to town lots in the towns in the Indian Territory. That in order to comply with the provisions of said act that his right to said premises may be properly protected plaintiff desires to place substantial, valuable and permanent improvements thereon. That unless plaintiff and his agents be permitted to enter thereon and thus permanently improve the premises therein, plaintiff will suffer great and irreparable injury, for which there is no adequate remedy at law, and that defendant in depriving plaintiff of the possession of the aforesaid premises, pendente lite, threatens to render the judgment of this court ineffectual.

Therefore, plaintiffs pray that the court grant an injunction instanter restraining defendants, their agents, attorneys and servants, from in any manner interfering with plaintiff, or his agents, in the use and occupancy of so much of the improved part of said premises

as may be necessary for him to use in permanently improving said premises.

BEAVERS & SAYERS,  
*Att'ys for Plaintiff.*

INDIAN TERRITORY,  
*Southern District:*

129 Theo. Fitzpatrick, being first duly sworn, deposes and says that he is the plaintiff in the above styled action, that he has read the above and foregoing amended complaint, and that the allegations therein contained are true.

THEO. FITZPATRICK.

Subscribed and sworn to before me this 16th day of Feb. 1899.

[SEAL.]

C. T. ERWIN,  
*Notary Public.*

EXHIBIT E.

In the United States Court for the Southern District of the Indian Territory, at Chickasha, October Term, 1900.

THEO. FITZPATRICK, Plaintiff,

vs.

J. P. ELLIS et al., Defendants.

*Answer at Law.*

Now comes J. P. Ellis, one of the defendants in the above entitled cause, and leave of the court first granted, files this his amended answer herein, and for such amendment denies:

First. That he has a verbal lease or any other kind of a lease on or about the — day of —, 1897, with the plaintiff, Theo. Fitzpatrick, or at any other time, where the plaintiff leased, demised and let the said defendant, J. P. Ellis the premises described in plaintiff's complaint, or any other premises.

Second. Defendant denies that he went into possession of said lot as described in plaintiff's complaint under plaintiff at any 130 time, and denies that he now holds possession of said lot under plaintiff in any way.

Third. Defendant denies that there is due plaintiff any rents or that he owes plaintiff any rents as alleged in said complaint, and denies that he holds any continuous possession of said premises unlawfully.

Fourth. That defendants deny that plaintiff was ever in peaceable possession of said premises, or was ever in possession of the same at any time and denies that plaintiff made a lawful demand on the defendant to quit and give possession of said lot.

Fifth. Defendant denies that -he- is due plaintiff as delinquent rents or any other money in the sum of Fifteen dollars or any other sum.

Sixth. Further answering, this defendant states and charges the truth to be that on the — day of —, 1897, that Theodore Barnhart, owned certain improvements situated on the lot described in plaintiff's complaint, consisting of a boxed building about 24 by 40 feet, used and occupied as a butcher shop, together with other out-buildings, which improvements the said Theodore Barnhart had long time prior thereto erected and placed upon said lot and all improvements thereon.

Seventh. That on or about said date this defendant arrived here from the state of Texas, knowing nothing about the land tenure of lots situated in the Indian Territory, except he had been advised and knew that they belonged to the Chickasaw and Choctaw Tribes of Indians. That this defendant had been advised and been  
131 informed that no person could purchase or own said lots, but could only purchase the right of occupancy and the improvements situated thereon, together with the privilege and right of purchasing said lots where they were for sale by the Government of the United States.

Eighth. That on or about the blank day of September, 1897, he purchased all of the said improvements upon said lot, as above described, from the said Theodore Barnhart, in good faith, and at the time of the said purchase of Theodore Barnhart represented and led defendant to believe that by purchasing said improvements he would then have the right and privilege of purchasing said lot when sold as above described. That at the date of said purchase, the said Theodore Barnhart, nor any other person, advised or informed him that the plaintiff, or any other person, claimed to have any interest in or to said lot or property whatever, nor did the defendant have any notice whatever, prior to the purchase of said improvements, nor for a long time thereafter, that this plaintiff, or anyone else, claimed any interest in or to said property, but on the other hand was led to believe and did believe that by purchasing all of said improvements he purchased the right to use and occupy said lot and all right that any person could own in and to said lot, until they were sold by the Government and that then he would have the right and privilege to purchase the same.

Ninth. That this defendant is now the legal and lawful owner of valuable, permanent and substantial improvements on said lot  
132 sued for by the plaintiff herein. And is the owner of all improvements situated upon said lot, which fact is conceded by plaintiff, and that he has been the owner of all improvements situated upon said lot since he purchased same in the Fall of 1897. And that plaintiff has never owned or claimed to own any improvements on said lot whatever, and does not now claim to own any of said improvements, situated upon said lot, but admits that this defendant, is the owner of all of said improvements.

Tenth. That defendant further states that plaintiff is not, and never has been, a member of any tribe of Indians, and has never resided in the town of Chickasha, Indian Territory.

Eleventh. That said plaintiff has never at any time had any im-

provements upon said lot, described in said complaint, nor has he at any time, ever been in possession of the same.

Therefore this defendant prays that he have judgment for the possession of said property, and have all costs of suit in this behalf expended, and for all other relief he may be entitled to either in equity or good conscience.

DAVIDSON & RIDDLE,  
*Attorneys for Defendants.*

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## EXHIBIT F.

THEO. FITZPATRICK  
vs.  
J. P. ELLIS et al.

On this the 20th day of October, 1900, this cause came on to be heard. The said parties appeared in person and by attorneys and answered ready for trial, when John Coyle and eleven other jurors, who had been previously sworn, were empanelled to try said cause, and having heard the evidence in the case and instructions to the jury, the jury retired to consider of their verdict, and subsequently returned into court, and being called answered to their names, returned the following verdict:

"We, the jury, empanelled and sworn to try the above entitled cause, find for the plaintiff for the possession of the property claimed and assess the damages at One Hundred and Fifty Dollars, rental value of said property, for two years and a half.

JOHN COYLE, *Foreman.*"

It is therefore ordered, considered and adjudged by the court that the plaintiff Theo. Fitzpatrick do have and recover of and from the said J. P. Ellis, the premises set out in the complaint, to wit: Lot 3, in Block 46, in the incorporated town of Chickasha, Indian Territory, together with his costs; and that a writ of possession issue for said property.

It is further ordered, considered and adjudged by the court that the plaintiff, Theo. Fitzpatrick, have and recover of and from the said J. P. Ellis and W. A. Govens, D. H. Butler and Joe Anderson, as sureties, in the sum of One Hundred and Fifty Dollars damages, for which let execution issue.

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## EXHIBIT G.

## Exhibit G.

Refer in reply to the following:

93846-1906.

96552-1906.

99078-1906.

107101-1906.

108844-1906.

G. A. W.

Department of the Interior.

Office of Indian Affairs.

WASHINGTON, January 8, 1907.

E. B. JOHNSON and H. B. JOHNSON, Contestants,

vs.

F. E. RIDDLE and MATT COOK, Contestees.

*Case No. 1784, Involving Title to Lot 3, Block 46, Town of Chickasha, Chickasaw Nation, Indian Territory.*

J. George Wright, Esq., U. S. Indian Inspector for Indian Territory, Muskogee, Indian Territory.

SIR: The receipt of your report of October 22, 1906, transmitting record and appeal in townsite contest case No. 1784 involving title to lot 3, block 46, in the town of Chickasha, Chickasaw Nation, Indian Territory, is acknowledged.

You report that contest was duly instituted by contestants filing formal complaint before the Townsite Commission for the Chickasaw Nation; that a hearing was had after due notice on May 26, 1906, and a decision rendered October 8, 1906, awarding the lot in controversy to the contestees. The original of such decision shows service on the attorneys for the contestees and contestants on October 4 and 5, 1906, respectively. Thereafter on October 15, 1906, within the time allowed, the contestants filed their motion and arguments for appeal, proper service being shown on the opposite parties.

To the complaint, which is accompanied by an application by the contestants to have the lot in controversy scheduled to them, is attached as exhibits, two deed-, certain court documents, and transcript of record and decision of the United States Court in other cases. These exhibits are designated consecutively by letters "A" to "L", inclusive.

It is alleged in the complaint that in the year 1892 one Theodore Fitzpatrick purchased the right of possession to lot 3, block 46, in the town of Chickasha and that on the — day of — 1897, he

leased the premises to one Theodore Barnhart, who thereafter leased to J. P. Ellis who subsequently thereto paid rent to Fitzpatrick until April 1, 1898; that on June 7, 1898, Fitzpatrick filed s-it in the United States Court, Southern District, Indian Territory, against

137 Ellis for possession of premises alleging as ground therefor the failure of the latter to pay rent then due; that on April 8, 1899, during the pendency of this suit, Fitzpatrick and Wife, Mary, conveyed all of their right, title and interest in and to the premises, to one Ella Cross, that thereafter on September 18, 1900, Ella Cross and her husband J. E. Cross conveyed an undivided one-half interest in the lot to R. M. Bourland, who, with his wife, and Ella Cross and J. E. Cross on May 25, 1903, conveyed the entire lot to contestants E. B. Johnson and H. B. Johnson, who claim to be the owners thereof and entitled to have it scheduled to them.

It is further claimed by the contestants that the suit as Brought in the United States Court, Southern District, Indian Territory, wherein Theodore Fitzpatrick is plaintiff versus J. P. Ellis defendant, for the possession of lot 3 block 46, Chickasha, wherein the plaintiff alleged that he was the owner of the premises and entitled to the possession thereof, was tried on October 20, 1900, and Judgment rendered in favor of the plaintiff for the possession of the premises, and thereafter Ellis prayed an appeal to the United States Court of Appeals for the Indian Territory, that on a hearing of the case the latter court affirmed the decision of the lower court that Ellis thereafter appealed the case to the United States Court of Appeals for the Eighth Circuit, which Court on October 27, 138 1902, affirmed the decision of the court of Appeals for the Indian Territory.

Contestants allege that in February and March, 1902, while the above emntioned case was pending, the townsite c-mmission for the Chickasaw Nation visited the town of Chickasha for the purpose of scheduling property to rightful claimants; and that one Dade D. Sayer, an attorney, in behalf of R. M. Bourland then a party to the pending litigation appeared before the commission at that time and listed the lot in controversy as in litigation. It is charged that thereafter, and without the knowledge or consent of the townsite commission, or of one Roy M. Bradford, the clerk in charge, the schedule was fraudulently changed by erasing the words, "in litigation", and inserting the names of F. E. Riddle and Matt Cook. In support of this allegation two letters, written by the Chairman of the Commission relative thereto, are offered. Contestants says that Ella Cross, R. M. Bourland or Dade D. Sayer, their attorney had no *acknowledgment* of the fraudulent/y erasure or alteration of the schedule until after the possession of the lot in controversy had been obtained under mandate of the United States Court of Appeals for the eighth Circuit, and the tender of the appraised value of the lot by Bourland and Cross had been returned by the Indian Agent.

139 The contestees, by way of protest, assert that the application as filed is insufficient in that it fails to show any legal reason or authority in the Indian Inspector to cause patent to be issued to contestants; that the application shows on its face that the



Indian Inspecor and the Department have no jurisdiction to entertain contest and pass title on the property. They further protest and except to the application proceedings and deny the authority of the above-mentioned officers to entertain or *or* pass on the title to the lot in controversy, for the reason that the question of title thereto is now pending in a certain suit in the United States Court at Chickasha, wherein the contestees are plaintiffs and Bourland and Cross, through whom contestants herein claim together with others are defendants. They assert that your office has no jurisdiction to hear a contest or decide the title to property for that reason.

By way of answering contestees emphatically deny that in 1892 Theodore Fitzpatrick purchased the right of possession in and to the lot in controversy, but allege that Fitzpatrick was then and is now a citizen of the United States and no- a member of any Indian Tribe or Nation in the Indian Territory, and that he undertook and attempted to purchase a piece of vacant and unimproved Indian Land belonging exclusively to the Choctaw and Chickasaw Nations  
 140 but that Fitzpatrick never had possession thereof nor of any of the improvements thereon.

Contestees admit that Theodore Barnhart some time during the year 1892 or 1893 erected on the lot a certain building of the value of \$150. that he was the exclusive owners of all the improvements on the lot and continued to be the owner thereof until the year 1897, when he sold them to J. P. Ellis, together with the right of occupancy to the lot; that Barnhart at the time had the legal right to sell the improvements and right of occupancy and that Ellis purchased without any knowledge that any one else claimed any right or interest therein. It is denied that Fitzpatrick sold any title or interest within and to the lot to Ella Cross or that the latter sold any interest in the lot to R. M. Bourland, or that Fitzpatrick and his grantee, Ella Cross, and her grantee, Bourland had any title or interest in the lot which they could sell or transfer.

Contestees admit that Fitzpatrick, on July 7, 1898, filed an unlawful detainer suit in the United States Court at Chickasha against one J. P. Ellis and others for the possession of the lot in controversy, but deny that the ownership or right to purchase the lot, or the ownership or any controversy whatever as to the improvements thereon were in any way involved in the litigation referred to, but  
 141 on the contrary, they assert that it was admitted by Fitzpatrick that all the improvements on the lot belonged solely to J. P. Ellis, and that Fitzpatrick did not at that time nor has he since claimed any title whatever in or to any of the improvements.

Contestees further answering say that the title to the lot and the improvements could not under the law in any way be effected or litigated or brought in question in the unlawful detainer suit, and rely on the provisions of Section 3365, Man-field's Digest, Chapter 67 to the effect that in trials under the provisions thereof the title to the premises in controversy shall not be adjudicated upon nor given in evidence except to show the right of possession and the extent thereof. It is admitted that the cause was appealed to the circuit



court of appeals but denied that the court adjudicated the title to the lot or improvements, but that the only question determined was that the complaint in question states a good cause of action for an unlawful detainer suit.

Contestees also deny that the lot was wrongfully scheduled to them or that there was fraud of any kind practiced on either of the applicants or the townsite commission, but aver the fact to be that Bourland and Cross or their attorneys appeared before the commission and represented to the clerk in charge that the lot was in litigation,

142 but without explaining the situation to them, that the Clerk, for purposes of future reference and not for the purpose of scheduling the lot, made a notation on the records to that effect. They allege that neither the title to the lot nor the ownership of the improvements were at that time or since in litigation, but on the contrary, it has been admitted at all time- and by all parties claiming in interest that Ellis was the sole owner of the improvements prior to the time he sold the right to contestees herein.

It is further alleged by the contestees that after Ellis purchased the improvements and possessory right to the lot from Barnhart, he (Ellis) erected additional improvements to the value of \$75. that prior to the scheduling of lots in Chickasha the contestees purchased all of the improvements from Ellis that these improvements were substantial and lasting; and that they were the sole and exclusive owners thereof when they appeared before the commission and made representations to that effect.

Contestees further allege that neither contestants nor their attorney did at any time while the commission was scheduling lots in Chickasha, appear before that body and make any claim of ownership of the improvements on the lot in controversy nor did they demand that the lot be scheduled to them by reason of their ownership of the improvements, nor did they file any contest before the commission or in any other way controvert contestees' ownership of the improvements, but on the contrary simply represented 143 to the clerk in charge that the lot in controversy was in litigation, thereby leading the clerk to believe that the improvements on the lot, as well as the possession thereof, were in litigation, thus causing the notation to be made on the records as aforesaid.

Contestees say further that the contestants claim no other right or interest in and to the lot except that they attempted to purchase from Bourland and Cross long after the lot had been scheduled to the contestess, with full knowledge thereof and of the fact that contestees were the absolute and sole owners of all the improvements thereon prior to the time the lot was scheduled and long after judgment had been rendered against Bourland and Cross in certain equitable proceedings instituted by contestants, as more fully set out as follows: That on July 15, 1905, after the lot had been scheduled to the contestees Bourland and Cross filed their petition in equity in the United States Court at Chickasha against J. P. Ellis D. H. Johnson, G. W. Dukes, J. Blair Shoenfelt, United States Indian Agent and contestees who were named defendants; (then follows a copy of the petition); that after issues had been joined in the case, the plaintiffs dismissed

their suit in open court and judgment for costs — rendered against them. Thereafter, the contestees assert by reason of the equitable proceedings and by reason of *equitable proceedings and* 144 *by reason of* the judgment rendered therein, the title to the lot was declared against Bourland and Cross and in favor of the contestees, and that the former, since that date, have been and are now estopped from again questioning any matter in regard to the title thereto.

At the request of counsel for the contestees, after deciding that the lot in controversy should be scheduled to them, you make certain findings of facts, which are as follows:

First. I find that the lot involved in this controversy is the same lot described in the pleadings and judgment in a certain unlawful detainer suit wherein Theodore Fitzpatrick was plaintiff and J. P. Ellis defendant, No. — and it appears from the description of said lot in said pleadings and judgment that neither the number, size or survey of same were changed by the townsite Commission for the Chickasaw Nation.

Second. I find from the evidence that said Theodore Barnhart, for a valuable consideration, sold and transferred all of said improvements and the occupancy of said lot to one J. P. Ellis sometime in the latter part of the year of 1897, and that the said Ellis thereafter erected other and additional improvements upon said lot to the value of about \$75.00.

Third. I find that on the 28th day of June, 1898, the date 145 of the final ratification of the Atoka Agreement, the said J.

P. Ellis was the exclusive owner of said improvements aforesaid, and all the improvements upon said lot.

Fourth. I find that on or about the 7th day of July, 1898, the said Theodore Fitzpatrick filed his suit in unlawful detainer in the United States Court at Chickasha against the said J. P. Ellis for the possession of said lot and that thereafter he filed his amended complaint in said cause, upon which said cause was tried; and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendant from preventing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the laws to purchase said lot; that said injunction was by the court refused; that said Ellis filed his answer in said cause, denying the allegations of said complaint and as a further defense set up the fact that he was the exclusive owner of permanent substantial and lasting improvements, other than temporary houses, tillage and fencing upon said lot.

Fifth. I find that in October, 1900 said cause came on for trial before the court and jury and that the issues were found in favor of said plaintiff for the possession of said lot. That thereafter the defendant Ellis prosecuted an appeal to the Indian Territory 146 court of Appeals which was by the court on the — day of —, 1902, affirmed, and that he further prosecuted a writ of error from the decision of that court to the Circuit Court of Appeals for the eighth circuit at St. Louis, and that in November 1902,

said decision of the Indian Territory Court of Appeals and likewise the decision of the United States Court at Chickasha was affirmed.

Sixth. I find that none of the improvements upon said lot were in any way in issue in said unlawful detainer suit, and that said J. P. Ellis' ownership of same was not denied or disputed either by the pleadings or the evidence of said Theodore Fitzpatrick but in the pleadings and evidence the said Fitzpatrick admitted the ownership of said improvements to be in the said Ellis, and that they were in no way adjudicated upon in said case.

Seventh. I find that on the 8th day of April, 1899, and while said unlawful detainer suit was pending the said Theodore Fitzpatrick by his quit-claim deed transferred and quit-claimed to one Ella Cross what interest he had or claimed within and to said lot; and I find that said Fitzpatrick did not claim to own any improvements upon said lot and did not intend or attempt to transfer the same to the said Ella Cross, and it is not contended that the said Ella Cross

by said quit-claim deed purchased any interest in said improvements, and I further find that the said Ella Cross and J. E. Cross by their certain quitclaim deed on *cht* 18th day of September, 1900, quitclaimed their one half interest within and to said lot to the said R. M. Bourland.

Eighth. I find that on the date said townsite of Chickasha was laid out by the townsite commission for the Chickasaw Nation and on the date the plats thereof prepared by said commission were finally approved by the Secretary of the Interior, the said J. P. Ellis was the owner of permanent, substantial and valuable improvements other than fences, tillage and temporary houses on said lot.

Ninth. I find that contestants' grantors, Bourland and Cross caused their attorney to appear before Roy G. Bradford, one of the clerks of said townsite commission and represented to the said Bradford that said lot was in litigation and the said Bradford was led to believe that the improvements upon said lot were likewise in controversy or in litigation and that under said impression the said Bradford made a temporary notation oposite the schedule of said lot upon the record, the words "in litigation", but that said notation was only intended to be temporary and for further investigation.

Tenth. I find that afterwards contestees herein purchased the improvements upon said lot from the said J. P. Ellis and secured a bill of sale or transfer thereof and went before said commission and presented said bill of sale and certified that they were the sole and exclusive owners of all improvements situated upon said lot and that the same were not claimed by any one else, and one B. Kelsey, a duly authorized clerk of said commission ascertaining that said lot had been erroneously marked in litigation erased the same and duly scheduled the same to said contestees herein.

Eleventh. I further find that as a matter of fact said improvements at the time the same were scheduled to contestees were not in any way in litigation and that said contestants nor neither their grantors made any claim before said commission that said improvements were in litigation or that they owned any interest in said improvement- and made no request or demand that said lot be scheduled

to them by virtue of being the owners of said improvements upon the same.

Twelfth. I find from the evidence that about the first of June, 1902 said commission proceeded to Chickasha to serve notice upon all persons to whom lots had been scheduled and appraised of their right to purchase said lots under the provisions of the Atoka Agreement and that notice was duly served upon contestees herein on or about the 12th day of June, 1902, of their right to purchase said lot under the provisions of the Atoka Agreement and that they  
 149 duly acknowledged receipt of said notice, and about the 19th day of said month they, according to the rules and regulations of the Department, forwarded to the Honorable J. Blair Shoenfelt, U. S. Indian Agent, at Muskogee, Saint Louis Exchange for the sum of \$375.00 the same being 62½ per cent of the appraisement and the full purchase price of said lot and that said Agent on or about the 29th day of said month duly acknowledged receipt of said money as the full purchase price of said lot.

Thirteenth. I further find that one of the contestants H. B. Johnson, at all times prior to and until after the schedule of said lot to the contestees herein recognized and acknowledged the said J. P. Ellis and his grantees, contestees to be the owners of said lot, and that recognizing said ownership on the 1st day of January 1902 he rented a portion of said lot from the said J. P. Ellis and expressly in said lease acknowledged the said Ellis to be the owner of said lot.

The contestants in their appeal, *amke* specifications of error number- 1 to 13 consecutively, in which they assigned as error your finding- of fact numbered 6, 7 8, 11, 13, and 10 as above. It is also alleged that you erred in failing to give full faith and credit to certain opinions, judgments, decisions, and process of the United States Territorial Courts and the Eighth Circuit Court of Appeals.

At the hearing of this case an agreement was entered  
 150 into by the parties which is as follows:

"In the matter of the application of E. B. and H. B. Johnson vs. F. E. Riddle and Matt Cook, to have scheduled to them lot 3, block 46, town of Chickasha Chickasaw Nation, Indian Territory, it is admitted by all the parties to this suit that lot 3, block 46 mentioned in the case of Fitzpatrick vs. Ellis and mentioned in the judgment in the said case in the United States Court for the Southern District of the Indian Territory, at Chickasha, and in the opinion of the U. S. Court of Appeals for the Indian Territory in the case entitled Ellis vs. Fitzpatrick and reported in the 64 S. W. Reporter and the lot 3, block 46 in the case of Ellis vs. Fitzpatrick reported in the 55 Vol. of the Circuit Court of Appeals reports is the same lot in controversy in this proceedings. It is agreed by the parties hereto that all the documents attached to the application of E. B. Johnson and H. B. Johnson may be admitted in evidence, but the competency and relevancy of the same is objected to by the Contestees."

Referring to Rule 1 of the Rules of Practice governing townsite contests, you express doubt as to the right of the contestants to file  
 151 contest herein, and call attention to a letter written by attorneys for Bourland relative to the scheduling of this lot, dated as early as September 26, 1902, as well as other correspond-

ence extending over the period between that date and the date contest was filed. You conclude that the contestants had ample notice, actual or constructive, of the scheduling of this lot, and express the opinion that contest is filed too late and for that reason should be dismissed. As the contestants and contestees both desire a decision on the testimony as introduced, however, you proceed to a consideration of the case.

It appears that the contestants and their grantors, having ascertained that the lot was scheduled as in litigation, relies on that, and failed to take prompt action for that reason, and for the further reason that they seemed to assume as a matter of course, that no award would be made by the Commission until pending litigation was finally disposed of. Charges of fraud in procuring the change in the schedule are made. The office, after an examination of the record on this point, agrees with your conclusion that these changes are not sufficiently sustained by the evidence to warrant their serious consideration in connection with this case.

It will be noted that, according to the terms of Rule 1 above referred to, the duty of serving notice on a losing claimant, either personally or by registered mail, in case of conflicting applications, is imposed on the Commission. This does not appear to have been done. On this peculiar state of facts it is deemed that the ends of justice will be best subserved by a consideration of this case.

There seems to be no controversy between either the contestants or contestees as to their respective claims of title. It appears that sometime in 1892, Theodore Barnhart rented the lot in controversy from Theodore Fitzpatrick the lot at that time being vacant; that Barnhart, after taking possession, erected a building thereon, which he used as a meat market; that sometime in September, 1897, Barnhart sold the improvements erected by him to J. P. Ellis, who took possession, and during his occupancy, erected additional improvements. Thereafter on March 26, 1902, Ellis quit-claimed all of his right, title and interest in and to the lot in controversy, the occupancy right thereto, and the improvements thereon, to F. E. Riddle and Matt Cook, contestees herein, receiving a valuable consideration therefor.

According to the record, Fitzpatrick, the original claimant to the lot, and a non-citizen white man, on April 8, 1899, conveyed whatever interest he had therein to Mrs. Ella Cross, who with her husband, on September 18, 1900, conveyed an undivided one-half interest to R. M. Bourland. On May 25, 1903 Bourland and wife and Mrs. Ella Cross and husband, conveyed their entire interest to E. B. and H. B. Johnson, contestants herein.

The question is raised on appeal as to the credit to be given the judgment rendered by the Territorial Courts and eighth Circuit Court of Appeals in the unlawful detainer suit involving this property.

Section 3365, Mansfield's Digest, under the head of Forcible Entry and Detainer, provides:

Under the provision of this *action* the title to the premises in ques-

tion shall not be adjudicated upon or given in evidence except to show the right to the possession and the estate thereof.

The suit in question was brought under the provision of this act.

The department decided in Chickasaw Land Contest Nos. 274 and 334, entitled Alexander v. Wright and Kempt v. Turnbull, respectively that a judgment in an action in the United States Court for the Recovery of possession of land in controversy *is* not res adjudicata in a contest case before the commission, for the reason that the causes of action in the two cases are not the same.

The exact point decided by the circuit court of appeals for the eighth district in the unlawful detainer suit referred to, is indicated by the following language of the Court (60 C. C. A. 261):

"We are of the opinion that the complaint states a good cause of action for unlawful detainer and as this is the only question which is before this court for review and as it was decided by both lower courts the judgment of each court is hereby affirmed."

An examination of the opinion of the court of appeals of the Indian Territory and the circuit court of appeals, eighth circuit, also shows in each instance that the court considered the improvements on the lot in controversy as belonging to Ellis, although recognizing the principle that, in certain contingencies, they would inure to the benefit of the landlord. It will also be noted that it is assumed in each decision that Fitzpatrick had no title to the lot. The court seems to have simply recognized and affirmed the well settled principle that assuming the relation of landlord and tenant to have existed, the tenant could not deny his landlord's title.

It is contended that the rights of the parties hereto are such as have risen solely out of the relation of landlord and tenant, and are to be considered accordingly. This is true in that both parties trace title back to Fitzpatrick and Barnhart, and, unless changed by act of the parties or operation of law, have only such rights as were acquired from them.

155 Ellis, as successor to the lease from Fitzpatrick to Barnhart, denies knowledge of Fitzpatrick's claim, and says he paid no rent to him, but that such money as he did pay, was paid under a misapprehension as to the purpose to which it was supposed to apply. This conflicts with the testimony of Barnhart and Fitzpatrick.

The successors in interest of Ellis purchased with full knowledge of the condition of the title and have in no way recognized Fitzpatrick nor his successors in interest as landlord. The contestants also purchased with full knowledge of all the facts relating to this property.

The record shows that on April 1, 1898, Ellis refused absolutely to pay rent under the lease which Fitzpatrick contends then existed. On July 7, 1898, Fitzpatrick took active steps to enforce his claim against Ellis by filing the unlawful detainer suit above mentioned.

Contestants contend that Ellis, by his failure to pay rent and comply with the terms of the lease, forfeited his right, if any ever existed, to remove the improvements from the property, and they therefore inured to the benefit of Fitzpatrick.

Ellis claiming under Barnhart, succeeded to the latter's rights and

was bound by the same duties and obligations. If he failed to examine the title and ascertain Barnhart's rights, he was merely negligent and failed in a simple duty imposed *by* law. In view of the conflicting testimony as to the knowledge of the claim of Fitzpatrick and of the law imposing the duty on a purchaser of real estate to make inquiry as to title thereto, the office is of the opinion that in order to release Ellis from his obligations to Fitzpatrick as a tenant, it should be more clearly shown that he was an innocent purchaser for value. Assuming therefore, that the relation of landlord and tenant existed between Ellis and Fitzpatrick, the nature and incidents of tenancy must be inquired into. It appears that Barnhart entered under a lease for one year at a certain rental which, under a verbal agreement, was allowed to continue after the expiration of the term, but at a reduced rent. The improvements were to remain the property of the tenant; while Barnhart was thus holding over Ellis succeeded to his interest.

A tenancy at sufferance is said to exist where a tenant for years holds over after the term expires, or where an under tenant holds over after the expiration of the term of the original lessee. Any act of the parties however, such as paying and receiving rent, creates a tenancy at will. The tenancy under consideration seems to come within one or both of these classes. Having succeeded to such rights as Barnhart had, and being bound by the ordinary obligations of such tenancy, the question next in order is, how are the rights of the parties affected by their subsequent action.

A tenancy at will or at sufferance is undoubtedly terminated by the tenant's refusal to pay rent. In this case that refusal occurred early in April, 1898. Ellis not only refused to pay rent but denied his landlord's title and attempted to set up title in himself without first surrendering possession. In the land contest case of Carland v. McDaniel (Choctaw No. 119), the department held that a tenant cannot deny his landlord's title even though the lease is void.

The tenancy having been terminated in April, 1898, what was the effect of the ownership of the improvements? Ordinarily where there is an express provision for the removal of improvements, a reasonable time after the expiration of the term is allowed for that purpose. Failure in this particular will, in the absence of some circumstance to change the rule, cause the improvements to inure to the landlord. Ellis continued in possession and allowed his improvements to remain on the land long after he, by his own act, had terminated the lease. Nearly three months intervened after he terminated the lease and before the Atoka Agreement became effective. More than three months elapsed before suit was filed for possession.

The point is made that Fitzpatrick by his failure to indicate an intention to claim the improvements, has waived at right. The law does not say that a landlord shall elect or reject the right to take improvements, but on the contrary, they are left in him without an affirmative act on his part, and unless intent is clearly shown to waive his right the improvements become his absolutely on failure by the tenant to remove within a reasonable time.



Contestees endeavor to show, however, that Fitzpatrick did by his acts indicate that he did not claim nor intend to claim the improvements in question. Proof on this point must necessarily be more or less negative in its nature. His failure to take positive action indicating an intention to claim should not be construed as an intention to waive his right, but his intention not to claim must, in a measure, be inferred from acts inconsistent with an intention to claim. Such acts have been clearly committed by Fitzpatrick. He apparently at no time claimed the improvements. In his second amended complaint in the unlawful detainer suit, above referred to, he gives as a reason why he should be put in possession of the lot, that he desires to place substantial, valuable, and permanent improvements thereon, in compliance with the terms of the Atoka Agreement. This is clearly an admission that he did not at 159 that time claim the improvements. If three or four months after his right accrued he indicated thus clearly that he did not claim them, it seems entirely within reason to assume that at no time prior to making this declaration did he make such claim. An examination of the record leaves little doubt that Fitzpatrick at no time prior to June 28, 1898, laid any claim whatever to the improvements.

The general rule that a tenant will not be allowed to deny his landlord's title is qualified in that he is not denied the privilege of showing that the landlord's title has expired or been extinguished by operation of law since the tenancy commenced. This is supported by ample authority and seems to be unquestioned law, and is justified on the theory that if the tenant were not allowed this privilege he would be obliged to account to the landlord under whom he entered, even though title of the former had been extinguished, as well as to the real owner who, subsequent to the entry, had assumed or asserted his rights.

The title to the lot in controversy at the time Fitzpatrick set up claim to it, and when Barnhart and Ellis entered under him, was in the Chickasaw Nation, and he had no improvements 160 thereon, the claims of these parties did not divest it of title.

They were not even tenants at sufferance. They were mere trespassers, and occupied the lot in direct violation of section 2118, Revised Statutes. The lot which they both claimed was the property of the Nation and subject to such laws as Congress might choose to enact. On June 28, 1898, the Atoka Agreement became effective. By its provisions the owner of the improvements on town lots was given the right to purchase on certain conditions. It also declared that all unimproved lots should be sold at public auction and the proceeds turned over to the nation. The town lots in Chickasha became subject to that law from and after its passage. The idea of any person holding or being allowed to purchase, except at auction, property on which he owned no improvements, is negated by the terms of the Act. A certain species of rights were recognized and no other. For a claimant to fail to come within the provisions of the law leaves no alternative but to schedule the lot to one who does come within its provisions,—the owner of the improve-



ments, or sell it at public auction, if unimproved. The law is clear and unequivocal on this point. Fitzpatrick's rights in the lot in controversy were extinguished by operation of law on June 28, 1898, as he owned no improvements thereon at that time. Ellis, as actual occupant of the lot, from and after that date, by operation of law ceased to be the tenant of Fitzpatrick and Congress, having declared Fitzpatrick's claim at an end, had by virtue of his ownership of the improvements, an indefeasible right in law to purchase it.

The principle must be recognized in connection with this case that he who asserts title in himself must sustain his claim on the strength of his own title, and not on the weakness of that of his adversaries. So far as the contestants are concerned, an examination of the record does not disclose any evidence of title in Fitzpatrick, through whom they claim, except that Barnhart and possibly Ellis, at one time recognized him as the landlord of the bare lot. The contention that Fitzpatrick purchased the lot in 1892 is not sustained by the evidence. The source of his title does not appear. The contestants were aware of the conditions under which they purchased and cannot plead ignorance or a purchase in good faith without notice. The recognition by one party of another as his landlord does not give the landlord any greater right than he had before the relation of landlord and tenant was established. The landlord must yield to the real owner of the fee, and the color of right obtained by the recognition as landlord is certainly not such that it acquires additional strength by transmission to third parties who have notice of the true situation.

There is placed in evidence by contestees Exhibit "2." This is an instrument signed by Ellis, the grantor of contestees, and by H. B. Johnson, one of the contestants, dated January 1, 1902, and purports to be an agreement between the signatories relative to certain uses of the lot in question. The contestant H. B. Johnson, therein admits that lot 3, block 46, is owned by Ellis and makes certain covenants and agreements on that basis. In the face of this, the contestants certainly cannot plead ignorance of the claims of others. If they chose to purchase under such conditions, they cannot now be heard to complain.

The contention is also made by the contestants that the improvements in question were not of a substantial nature and not intended to be permanent. If this were so it is difficult to see how it could strengthen Fitzpatrick's title. He did not own them at the time, and if they were not permanent, the lot would necessarily be unimproved and subject to sale as a vacant lot. It is not shown however that the improvements were not such as are contemplated by law to entitle the owner to purchase, and the officers charged with the duty of making the schedule found them to come within the law.

It is therefore held that the contestees F. E. Riddle and Matt Cook, are entitled to have lot 3, block 46, in the town of Chickasha, Chickasaw Nation, Indian Territory, scheduled to them. Your decision to that effect is affirmed.

You are requested to notify the parties to that effect and of their right to appeal.

Very respectfully,

C. F. LARRABEE,  
*Acting Commissioner.*

A. J. W.—E. H.

#### EXHIBIT G.

It is also agreed that the following is the opinion rendered by the Secretary of the Interior, affirming the opinion of the Commissioner of Indian Affairs and the United States Inspector for the Indian Territory in said contest case No. 1784.

DEPARTMENT OF THE INTERIOR. G. A. W.  
OFFICE OF INDIAN AFFAIRS.  
WASHINGTON, April 20, 1907.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs,  
164 do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.]

C. F. LARRABEE,  
*Acting Commissioner.*

#### EXHIBIT G.

Commissioner of Indian Affairs.

SIR: February 1, 1907, (Land 6015-1907), your office transmitted to the Department the record in townsite contest case No. 1784, entitled E. B. Johnson and H. B. Johnson v. F. E. Riddle and Mat Cook, contestees, involving title to lot three block 46 in the town of Chickasha, Chickasaw Nation, Indian Territory, on appeal by the contestants from the decision of your office of January 8, 1907, awarding the lot in controversy to the contestees.

Many and varied questions of law are presented in the voluminous briefs of counsel on file in this case, and all of same are carefully and at some length considered, and satisfactorily disposed of in the decision of the Inspector in charge and also in the decision of your office.

165 The vital and controlling questions under the Act of June 28, 1898, (30 Stats., 508) as extended and continued by the acts of March 1, 1901, (31 Stats., 864) and July 1, 1902 (32 Stats., 652) are, were there permanent substantial and a valuable improvements upon the lot in controversy, and, if so, who owned them.

Both of these questions are decided by the Inspector and again by your office in favor of the contention of the contestees; and these decisions are sustained by the evidence appearing in the record.

The department concurs in your decision of January 8, 1907, and the same is hereby affirmed.

All papers are returned herewith and you are requested to notify local counsel.

Very respectfully,

Inclosures.

J. R. GARFIELD, *Secretary.*

EXHIBIT G.

It is further agreed that the following is the opinion of the Assistant Attorney General for the Interior Department on the petition of the contestants to review the action of the Secretary of the Interior in said contest case No. 1784.

166

EXHIBIT G.

L. L. E.

L. R. S.

A. A. G. 1487-1907.

The Commissioner of Indian Affairs.

SIR: On May 11, 1907 (I. T. 42385-1907), your office forwarded a motion for review of departmental decision dated April 12, 1907, filed in your office on May 1, 1907 by the attorney for contestants in town site contest case No. 1784, entitled E. B. and H. B. Johnson, contestants, vs. F. E. Riddle and Matt Cook, contestees, involving lot 3, block 46, town of Chickasha, Chickasaw Nation, Ind. I.

Said departmental decision affirmed the decision of your office dated January 8 1907, which also affirmed the decision of the Inspector in favor of the contestees.

The motion alleges that "said decision is contrary to the uncontradicted evidence in the case," and complaint is made that the decision does not refer to the evidence, but merely holds that the contestees were the owners of the improvements on said lot and does not fix the time when they were the owners; second, "that the decision is contrary to and in conflict with the law as declared by the various courts, including the United States Supreme Court, your (this) Department, and as contained in the United States statutes applicable to the facts in the case, "and reference is made to the brief filed on the appeal from your office decision; third, "that the decision asked to be reviewed is contrary to the law and the undisputed facts upon the question of fraud perpetrated by the appellees in having the lot scheduled to them," and complaint is made that the decision makes no reference to the question of fraud.

The record shows that said lot was scheduled to the contestees in the spring of 1902; that on February 20, 1906, the contestants filed in the office of the United States Indian Inspector for Indian Territory their application that patent issue to them for said lot and inclosed therewith St. Louis exchange in the sum of \$375, the full appraised value of the lot.

A hearing was had on May 20, 1906, at which the parties ap-

peared in person, submitted testimony, and were represented by counsel.

On October 1, 1906 the Inspector considered the case very fully and rendered a decision, covering twenty-nine typewritten pages, in favor of the contestees.

The claim of the contestants, as stated in their application and in the Inspector's decision, is that in 1892, Theodore Fitzpatrick purchased the right of possession to said lot and "on the — day of — 1897, leased the same to Theodore Barnhart," who subsequently

leased the premises to J. P. Ellis, who paid rent thereon to 168 said Fitzpatrick until April 1, 1898; that on July 7, 1898, said Fitzpatrick filed suits in the United States court for the

Southern District of Indian Territory against said Ellis to recover possession of said premises on account of his failure to pay the rent due; that on April 8, 1899, while said suit was still pending said Fitzpatrick and wife conveyed their interest in said lot to Mrs. Ella Cross, who, with her husband, J. E. Cross on September 18, 1900, conveyed an undivided  $\frac{1}{2}$  interest in said premises to R. M. Bourland; that on May 5, 1903, said Cross and wife and said Bourland and his wife Millie Bourland, conveyed said premises to the contestants. The Inspector refers to the claim of the contestants that said suit in which the plaintiff alleged that he was the owner of said premises and entitled to the possession thereof was finally decided in favor of the plaintiffs by the United States Court of Appeals for the Eighth Circuit, on October 27, 1902, that during the pendency of said judicial proceedings the Townsite Commission visited the town of Chickasha in February and March, 1902, to make a schedule of lots therein, and one Dade D. Sayer at the instance of said R. M. Bourland appeared before the Commission while its employees were making a schedule of the improvements upon the lots in said town, and ascertained that said lot was listed as being in litigation; that afterwards, without the knowledge of the Commission or the clerk in

charge, Roy M. Bradford, the schedule was fraudulently 169 changed by erasing the words "in litigation," and inserting the names of contestees, citing in support of said last-named contention the letter of the chairman of the Commission dated September 30, 1902, copy of which is attached to the application, and also the affidavit of said Sayer dated February 20, 1903, that neither said Ella Cross, R. M. Bourland, nor Dade D. Sayer, their attorney, knew of said alteration of said schedule until after possession of said lot had been secured under the mandate of the United States Circuit Court of Appeals for the Eighth Circuit, and the appraised value of the lot had been tendered to the United States Indian Agent by said Ella Cross and said Bourland when they were informed that said lot had been scheduled to said contestees, and the amount tendered was returned.

Contestees also aver that said application of contestants is insufficient and deny the jurisdiction of the Department to allow a contest and pass upon the title of the property, because the title to the lot was then pending in a certain suit in the United States court at Chickasha, wherein contestees are plaintiffs and said Bourland and Cross et

al., are defendants, through whom the contestants claim title to said lot. The contestees further deny in their answer the allegations of the contestants relative to the purchase of the possessory right to said lot by said Fitzpatrick in 1892, and claim that he was and is now a white man, not a member of any Indian tribe or nation in the Indian Territory; that said Fitzpatrick attempted to purchase a piece of vacant and unimproved land belonging to the Choctaw and Chickasaw nations, and that he has never at any time had possession of said lot or the improvements thereon. The contestees also claim that said lot was rightfully scheduled to them because they were the owners of the improvements thereon prior to and at the time of the appraisalment of the lot, by reason of their purchase, in March 26, 1902, from one J. P. Ellis, who bought the improvements with the right of occupancy from said Barnhart in 1897, and afterwards said Ellis erected a three-room house on said lot, worth \$75, which he sold to contestees with the other improvements, as above stated. The contestees deny that the title to the lot or to the improvements was, or could be, litigated in said suit, under Section 3365, Mansfield's Digest of the Laws of Arkansas, which declares that

In trials under the provisions of this act the title to the premises in question shall not be adjudicated upon or given in evidence except to show the right to possession and the extent thereof,

and they deny that any fraud was practiced in making said schedule, and declare that neither said Bourland nor Cross, through whom contestants claim, in person or by attorney, made any claim or filed any contest for said lot while said schedule was being prepared.

The contestees also claim that the contestants are estopped from asserting any right to said lot because their alleged purchase from Bourland and Cross was long after said schedule was made and subsequent to the rendition of judgment in the United States Court for the Southern District of Indian Territory in an equity case entitled R. M. Bourland et al. vs. D. E. Johnson et al., No. 694, wherein the plaintiffs set out the proceedings of said unlawful detainer suit, and alleged that the contestees had fraudulently procured said Townsite Commission to schedule and list said town lot to them; that said suit, after demurrer and answer of the defendants had been filed was dismissed on February 19, 1903, on motion of the plaintiffs and judgment for costs rendered against them.

The Inspector calls attention to rule No. 1, of the Rules of Practice governing contest cases, and expresses some doubt as to the right of contestants to institute a contest in this case because by the exercise of ordinary diligence they could have known of the claim of contestees that said lot should be scheduled to them; that on September 27, 1902, a protest against the issuance of patent to said lot was received by the Inspector from said Bourland, signed by his attorneys, Potter & Potter, and afterwards, on July 31, 1903, contestant H. B. Johnson remitted to the United States Indian Agent draft for

\$281.25, three-fourths of the appraised value, referring in his letter of transmittal to said suit in the United States court, also to the tender of first payment by Messrs. Bourland and Cross, and stating that they "understood that the attorneys for parties claiming this lot have tendered the Government payment, which he says was done through fraud and the contestant asks the Agent to "return the payment and issue Bourland and Cross their receipt in full" for said lot.

The Inspector quotes from the letter of the chairman of the Commission dated September 30, 1902, Exhibit "I" and expresses the opinion that the contestants or their grantors knew of the claim of the contestees and ought to have filed their contest within ten days after the notice of payment had been served and that this application comes too late and should be dismissed.

He proceeds, however, to consider the testimony and makes special findings of fact in accordance with the wishes of both parties.

The evidence concerning the alleged fraudulent change in the record is considered by the Inspector, and he quotes from the testimony of Roy M. Bradford, clerk in charge for the Commission, who examined the lots in Chickasha, also his assistant, one J. B. Kelsey, relative to the manner in which said lot was marked "in litigation" by said Bradford, which words were subsequently erased by said Kelsey, who swears that he scheduled the lot to the parties who brought him the bill of sale and certified that they owned the improvements; that prior to the time he (Kelsey) saw on the preliminary schedule said notation "in litigation," opposite said lot, and says he called said Bradford's attention to it and asked him what it meant, and Bradford said "some parties came up and stated it was in litigation," and that he asked Bradford if it was the improvements, and he said "no, it was the lot;" that Kelsey told Bradford that their "instructions were to schedule the lots to the owners of the improvements and we could not pay any attention to the lot and did not care anything about the lot." Kelsey further swears that he don't think he had any conversation with Mr. Riddle "at time of erasing" said notation, but made the erasure of his own motion because his instructions were "to schedule to the owners of improvements." (Record, page 47.)

On cross-examination Mr. Kelsey denies that his instructions were that there was any controversy to the lots to mark them "in litigation;" Kelsey also denies that he told Bourland that he had scheduled the lot in litigation, which statement is contradicted by Mr. Bourland.

The Inspector states that the only question to be determined in this case is who owned the improvements upon the lot in controversy at the time the Townsite Commission scheduled the same. He sets out in full the agreement by J. P. Ellis, party of the first part, the grantor of contestees, made with H. B. Johnson, party of the second part, one of the contestants, dated January 1, 1902, which recites, among other things, that said Johnson desires to use "the rear end of lot No. 3, in block 46, owned by party

of the first part, and he hereby agrees to erect good, substantial water-closets, and to fence the same in with a good board fence, and to be paid for said improvements in the use and rent of said premises."

The agreement also recites that "it is specially agreed that said improvements so erected shall be the property of first part."

The Inspector holds that said agreement admits that Ellis was the owner of said lot. The objection of contestants to the competency of the deposition of said Ellis on account of his plea of guilty to the charge of perjury in the United States court at Chickasha is overruled, for the reason that he was never sentenced.

The Inspector concludes his decision with an elaborate finding of facts upon the request of contestants, (contestees) which substantially confirms their allegations that at the date of the ratification of the Atoka agreement by the act of June 28, 1898 (30 Stat., 495); also when the town site of Chickasha was laid out by the Townsite Commission and the plat of said town approved by the Secretary of the Interior said J. P. Ellis was the owner of permanent, substantial,

and valuable improvements other than fences tillage, and

175 temporary houses on said lot; that none of the improvements on said lot were involved in said unlawful detainer suit filed by said Fitzpatrick on July 7, 1898, and finally decided in November, 1902; that on April 8, 1898, said Fitzpatrick by quitclaim deed transferred to Ella Cross his interest in said lot, and that afterwards she and J. E. Cross, by quitclaim deed, conveyed one-half interest in said lot to said R. M. Bourland; that said notation "in litigation" was made by said R. M. Bradford at the request and upon the representations of the attorney of said Bourland and Cross, and that the improvements upon said lot were in litigation and that said notation was only intended to be temporary and for further investigation; that afterwards contestees purchased the improvements upon said lot from said Ellis, and that the bill of sale went to said Kelsey, a duly authorized clerk of said Commission, and certified that they were the sole owners of the improvements and that the same were not claimed by any one else, whereupon said Kelsey erased said notation and scheduled the lot to the contestees; that when said lot was scheduled to the contestees the improvements were not in litigation, and that neither contestants nor their grantors made any claim before said Commission that the improvements were in litigation or that they owned any interest therein or that said lot should be scheduled to them.

176 The Inspector further finds that about the first of June, 1902, said Commission went to Chickasha to serve notices of right to purchase upon parties to whom lots had been scheduled, and that contestees were served with such notice about June 12, 1902, and on the 19th day of the same month they transmitted \$375.00, the full purchase price of said lot to the United States Indian Agent at Muskogee and received a receipt therefor on or about the 29th day of said month; that one of the contestants, H. B. Johnson, at all times prior to and until after said lot was scheduled to the contestees, recognized said Ellis and his grantees to be the owners of said lot, as



appears by said agreement dated January 1, 1902, above referred to, and the Inspector held that said lot should be scheduled to the contestees.

The Contestants appealed, alleging that the findings of fact by the Inspector were not supported by the evidence and that he erred in not giving full faith and credit to the judgment of the court in said suit of Fitzpatrick vs. Ellis.

On January 6, 1907, your office considered said appeal and the record in said case, referred to the claim of the respective parties, quoted the findings of fact by the Inspector, and concurred with his conclusion that the charges of fraud in procuring the change of the schedule "are not sufficiently sustained by the evidence to warrant their serious consideration in connection with this case."

177 Your office also concurs with the Inspector that the record shows that Fitzpatrick did not at any time prior to June 28, 1898, lay any claim whatever to the improvements and that whatever right Fitzpatrick may have had to said lot was extinguished by operation of law on June 28, 1898, because he had no improvements thereon at that time, and that Ellis being the actual occupant of the lot from and after that date, ceased to be the tenant of Fitzpatrick by operation of law. A scant consideration was given by your office to the contention of the contestants that the improvements in question were not of a substantial nature to warrant its sale as improved, and the point is well made that if this were so the lot would have to be sold as vacant. Upon consideration of the whole record your office affirmed the decision and held that the lot should be scheduled to the contestees.

The contestants appealed, alleging, in substance, the same errors as in their appeal from the decision of the Inspector, and the Department on April 12, 1907, affirmed your office decision in which it was stated that the decisions of the Inspector and your office upon the various questions of law presented in the record were correct; that the controlling question under said act of June 28, 1898, and subsequent legislation, are "were there permanent, substantial, and valuable improvements upon the lot, and if so who owned them;" that

178 both of said questions were correctly decided by the Inspector and your office, which decisions are sustained by the evidence in the record.

The claims of the parties and the finding of the Inspector in his decision have been set out at length herein to show that the complaint of the contestants in their motion for review is not well founded. The reference in the departmental decision to the decisions of the Inspector and your office clearly indicated that the Department concurred generally in the findings of fact and conclusions of law, and that upon the whole record the schedule of said lot to the contestees was right and should not be changed. No new question is presented for consideration and under the well established rule of the Department, the action could be dismissed for that reason alone. *Grathjan vs. Johnson*, 15 L. D., 195; *Stone vs. Cowles*, 14 L. D., 90.

It is also the well-established ruling of the Department that the concurring decisions of the Inspector and your office on questions of fact will not be reversed unless clearly wrong and that motion for

review will not be granted on the ground that it is contrary to the weight of the evidence, unless it affirmatively appear that the decision is clearly wrong and against the palpable preponderance of the evidence. *Guthrie Townsite vs. Paine et al.*, 13 L. D. 562; Departmental decision May 7, 1907, *Capital Townsite Company vs. Shanks*.

179 It cannot be denied that under the provisions of said act of June 28, 1898, the right to lay town lots in the Choctaw and Chickasaw nations "on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses have been made," is expressly limited to the owner of the improvements on each lot. It may be conceded that while the tenancy exists the tenant may not dispute the title of the landlord, and it is also well settled that "a lessee may plead that although the lessor held an interest in the premises at the time of the making of the lease his interest terminated before the alleged cause of action arose." *Taylor's Landlord and Tenant*, 7th Edition, Secs. 629-708; *Am. Eng. Enc. of Law*, Vol. 18, p. 422.

It is quite manifest that the contestants, who claim by an alleged purchase from said Bourland and Cross long after said lot was scheduled to the contestees, have no right to demand that the schedule be changed and the patent issued to them. They do not claim to have been owners of the lot when it was appraised by the Townsite Commission, and the law requires that the lot shall be scheduled to the owners of improvements at the time the schedule and appraisement are made.

From a careful reexamination of the whole record, it is found that said decisions of the Inspector, your office, and the Department are correct, and said motion must be and it is hereby denied. The papers are herewith returned.

Yours very respectfully,

— — — — —, *Secretary*.

180 And on the back of said Amended Answer and Cross Complaint of Defendants, and the Exhibits attached thereto numbered from A to G, inclusive, appears the following filing endorsement: Filed in open court, Aug. 20, 1907. C. M. Campbell, Clerk.

181 And afterwards, to wit, on the 19th day of August, 1907, plaintiffs filed in said court their motions to strike out portions of defendants' cross-complaint and motion to make more specific and certain, which said motions are in the words and figures following, to wit:

*Motion to Strike Out.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE, Plaintiff,

vs.

ELLA CROSS, R. M. BOURLAND, E. B. JOHNSON, H. B. JOHNSON,  
and FIRST NATIONAL BANK BUILDING COMPANY, Defendants.

Comes now the plaintiff in the above entitled cause and files this his motion to strike out portions of the defendant's cross-complaint filed herein and for such motion alleges.

First. That beginning on page ten said defendants in their cross petition undertake to set up certain alleged rights under a certain alleged contract in reference to the erection of a party wall upon the lot in controversy, and also alleging certain errors in the Interior Department in passing upon the competency and admissibility of certain evidence sought to be introduced by said defendants in their behalf in the proceedings before the department in reference to said lot, and claiming that said department committed certain errors  
182 in passing upon objections to said testimony and in excluding the same, and it is clearly shown from that portion of said answer that all of said matters in reference to said contract were passed upon by the department and the evidence sought to be introduced before the Department, as alleged, was ruled upon by the Department and held incompetent and immaterial, and it was also held that a sufficient predicate had not been laid for the introduction of secondary evidence; therefore that portion of said answer should be stricken out for the reason the ruling of the department upon said questions, as shown by said answer, is conclusive upon this court.

Wherefore plaintiff prays that that portion of said answer be stricken.

W. A. LEDBETTER,

A. C. CRUCE,

FRANK M. BAILEY,

*Attorneys for Plaintiff.*

Endorsed on back: Filed in open court, Aug. 20, 1907. C. M. Campbell, Clerk.

183

*Motion to Make More Specific and Certain.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

E. F. RIDDLE, Plaintiff,

vs.

ELLA CROSS, R. M. BOURLAND, E. B. JOHNSON, H. B. JOHNSON, and  
FIRST NATIONAL BANK BUILDING COMPANY, Defendants.

Comes now the plaintiff and files this motion to require the defendants herein to make certain portions of their answer more specific and certain in this: That said defendants in their cross petition undertake to allege the erection of certain improvements upon said lot, but fail to allege the date of the erection of said improvements. Plaintiff now asks that said defendants be required to allege the date of the erection of said improvements, and whether or not the same were erected prior to or subsequent to the filing of this suit.

Second. It is further shown by the cross-petition of said defendants that they obtained some kind of a deed from Bourland and Cross, and they state that the same is made a part of said cross-complaint as an exhibit thereto, but that the same does not appear to have been attached thereto.

Wherefore, plaintiff prays that said defendants be required to make said cross complaint more definite and certain as to the date of said improvements as herein set out, and attach a copy of said instrument of writing or conveyance as alleged.

W. A. LEDBETTER,

A. C. CRUCE,

F. M. BAILY,

*Attys for Pltff.*

Filed in Open Court Aug. 20, 1907. C. M. Campbell, Clerk.

184 And afterwards, to wit, on the 20th day of August, 1907, plaintiffs filed in said court their answer to defendants' cross-complaint, which said answer is in the words and figures following to wit:

*Plaintiff's Answer to Defendants' Cross-complaint.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE, Plaintiff,

vs.

ELLA CROSS, R. M. BOURLAND, E. B. JOHNSON, H. B. JOHNSON, and  
FIRST NATIONAL BANK BUILDING COMPANY, Defendants.

Comes now the plaintiff and files this his answer to the cross petition filed herein by H. B. and E. B. Johnson, without waiving

his demurrer filed herein, but still insisting upon the same, and for such answer alleges and denies as follows:

First, Plaintiff denies that in the year 1892, or at any other time the said Theodore Fitzpatrick was the owner of the lot described in plaintiff's complaint, or that he had any real interest therein; but alleges that the same belonged solely and exclusively to the Chickasaw and Choctaw Tribe of Indians, with the exclusive right and authority to dispose of the same with the assent, and concurrence of the Congress of the United States, and further denies that 185 said defendants or either their alleged quit claim conveyances attached to said cross petition, or otherwise. Plaintiff further denies that said Theodore Fitzpatrick in 1892 was ever in the peaceable possession of said property, but that the same was a vacant piece of public domain belonging exclusively to the Chickasaw and Choctaw Nations.

Second, Plaintiff admits that the alleged transfers referred to in said cross petition and made exhibits thereto were made pending the litigation referred to, but specially denies that at the time said alleged transfers were made it was understood and agreed between the parties that the said Theodore Fitzpatrick should continue to prosecute said suit for the benefit of his grantees, and that he did prosecute said suits in his own name for the use and benefit of said grantees, and denies that by reason of any such understanding or agreement said grantees became the beneficiaries of said judgments or rights awarded thereunder.

Deny that defendants purchased said property for a valuable consideration without any notice or knowledge that the said Ellis claimed ownership of and in the improvements separate and distinct from the lot.

Third, Plaintiff further denies that all the right ever acquired by plaintiff within and to said property was from a transfer and purchase from the said J. P. Ellis, and denies that all the rights acquired by the said Ellis were acquired by virtue of a lease 186 contract between him and the said Theodore Fitzpatrick, and denies that he wrongfully kept possession of said property by executing supersedeas bonds, or that he was ever wrongfully in possession of the same.

Fourth, Plaintiff denies that the said Fitzpatrick prior to the transfer of his alleged interest in said lot to Bourland and Cross claimed the preference right to purchase said lot as an improved lot by reason of his ownership and possession thereof and by reason of the improvements placed thereon by his tenants Barnhart and Ellis, and denies that he ever at any time prior or subsequent to the alleged transfer claimed any interest in said improvements; denies that the said Bourland and Cross, by their alleged purchase from said Fitzpatrick, claimed the preference right to purchase said lot as an improved lot under the Act of Congress, as alleged, by reason of their alleged ownership of the lot and improvements on same placed thereon by said Barnhart and Ellis, as alleged, and denies that they claimed the right to purchase the same by reason of any undivided interest in a brick wall situated on same; denies

that the said Cross and Bourland made any claim before said Townsite Commission to the ownership of any improvements upon said lot; denies that they ever demanded that the lot be scheduled and appraised to them by virtue of owning any improvements upon same, or that they ever at any time demanded that said lot be scheduled and appraised to them and that they be given the

187 preference right to purchase same by the Townsite Commission prior to the time said lot was scheduled and appraised to plaintiff herein; denies that said lot was ever scheduled "in litigation," as alleged, or that plaintiff procured the Townsite Commission to change the schedule of said lot, as alleged in said cross complaint, but admit that the lot was scheduled to plaintiff and Matt Cook, by reason of their demand to have the same scheduled to them and by reason of the fact that they were exclusive owners of the improvements situated upon said lot at said time.

Fifth. Plaintiff admits that the defendants named in said cross petition instituted a contest against the plaintiff and said Matt Cook in the Interior department and that after a full hearing by all parties said lot was regularly and duly awarded to said plaintiff and said Matt Cook and the schedule theretofore made was held intact and that patent issued to said plaintiff and he is now the legal and equitable owner of said lot.

Sixth. Plaintiff denies that said Department made several mistakes and errors of law and that they misconstrued the law relating to the rights of the parties, and denies that they made several mistakes and errors in the application of principles of law to the facts arising in said case.

Seventh. Plaintiff denies that the said department construed the law and made such rulings in favor of plaintiff as construed by the defendants herein, as set out in their cross-complaint in paragraphs one to twelve inclusive, but alleges the truth to be 188 that said defendants have wholly misconstrued the rulings and decisions of the Department in each and all of said sections and paragraphs.

Eighth. Plaintiff denies that said Department decided all the different questions as set out by defendants, in favor of plaintiff, as construed by said defendants in their cross-petition; denies that the law on each of said issues as set out in said twelve paragraphs was and is in favor of said defendants on said cross petition, and denies that it should have been so construed under the facts and conclusion of facts reached by the Interior Department.

Ninth. Plaintiff denies that said improvements ever at any time became the property of said Fitzpatrick, or that he ever claimed the same or ever disputed said title of the said Barnhart and Ellis within and to said improvements; denies that said improvements were ever forfeited to said Fitzpatrick or his alleged grantees, as alleged and denies that the said Fitzpatrick ever in any way claimed that the same were forfeited to him. Plaintiff denies that said unlawful detainer judgment decided that the said Fitzpatrick was entitled to the lot and the improvements thereon, or that said

ownership or title to said lot was in any way involved or litigated in said suit.

Tenth. Plaintiff further denies that there was any contract made, as alleged, by said defendants in reference to a partition wall upon said lot and the ownership of which should be determined upon the result of said unlawful detainer suit, as alleged; but alleges that all of said matters in reference to said partition wall upon said lot and said contract have been passed upon and adjudicated by the Interior Department and said findings and rulings of the Interior Department upon all of said matters and issues are conclusive and binding upon this court.

Eleventh. Further answering herein this plaintiff further denies that the alleged facts as set out in said cross complaint are as found by the Interior Department and denies that the alleged facts set out therein are in accordance with the evidence introduced before the Interior Department and denies that said cross-petition sets out the conclusion of facts as found by the Interior Department; denies that the construction placed upon the facts and evidence introduced before the Department and the construction placed upon the conclusion of facts, as alleged, by the Interior Department, as set out in said cross-petition by said defendants, is different and contrary to the actual findings and conclusion of facts as found and adjudicated upon by the Interior Department.

Twelfth. Plaintiff further denies that the improvements erected upon said lot were made by the said E. B. & H. B. Johnson in good faith, under color of title, and as bona fide occupiers of said lot, and denies that said improvements cost the sum of \$7,500.00 as alleged, and denies that they enhance or increase the value of said lot to the amount of \$10,000.

Thirteenth. Plaintiff further alleges that by reason of the cross petition filed herein by the said E. B. & H. B. Johnson, and by reason of the claim asserted to said lot by said defendants herein, and by reason of the alleged conveyances made a part of defendants' answer, Ella Cross and R. M. Bourland and the said E. B. Johnson and H. B. Johnson, and by reason of the claim made by the said petitioners, E. B. Johnson and H. B. Johnson, of erecting permanent improvements upon said lot under color of title and in good faith, plaintiff's title to said property is clouded and said plaintiff is entitled to have a decree of this court removing the cloud from said title and quieting the title of said property in said plaintiff.

Wherefore, premises considered, plaintiff prays that on final hearing he have judgment for the possession of said property and for his rents, revenues and damage, as prayed for in his original petition, together with interest thereon at the legal rate, and further prays that the cloud now against the title to said property be removed and that plaintiff's title be quieted against the said Ella Cross and R. M. Bourland, as well as the said E. B. Johnson and H. B. Johnson, and prays for such other general and special relief, together with his costs, as he may be entitled to.

W. A. LEDBETTER.

A. C. CRUCE.

EDWARD M. BAILEY



Personally appeared before me the undersigned authority, F. E. Riddle, who on oath states that the facts and statements contained in the above answer are true as he verily believes.  
[SEAL.] F. E. RIDDLE.

Subscribed and sworn to before me this 19th day of August, 1907.

MAMIE DEVLIN,  
*Notary Public.*

And endorsed on the back of said plaintiff's Answer to defendants' cross-petition, appears the following: Filed In Open Court, Aug. 20, 1907. C. M. Campbell, Clerk.

192 *Journal Entry—Order Sustaining Plff's Motion to Strike.*

The following Journal Entry appears of record in the Journal of said Court, of date, Tuesday August 20th, 1907.

F. E. RIDDLE et al.

vs.

W. D. BELL et al.

(March, 1907, Term, Tuesday, August 20th, 1907.)

Motion of plaintiff to strike out of defendants' cross-bill that portion of parole testimony as to the party wall, is after due consideration by the court sustained, to which action of the Court the defendant in open court excepted.

193 *Journal Entry—Judgment on Motion to Strike.*

The following Journal Entry appears of record upon the Journal of said Court:

In the United States Court within and for the Southern District of the Indian Territory, at Chickasha.

762.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Judgment on Motion.*

Now, at this time, came on to be heard the above entitled cause upon the motion of the plaintiffs filed herein to strike out that portion of the defendants' cross-complaint relating to the ruling of the

Land Department relative to a certain partition wall described therein and it appearing to the court that all of said matters allowed in regard to said partition wall was before the land department and that the ruling and findings of the land department upon said matters are conclusive upon this court, and that said motion is well taken and should be sustained:

It is, therefore, ordered, considered and adjudged by the court that said motion be and is hereby sustained and that part of the cross petition is hereby stricken out. To which order of the court the defendants duly except in open court.

J. T. DICKERSON, *Judge*.

Endorsed on back: Filed in open Court Aug. 21, 1907. C. M. Campbell, Clerk.

194      *Agreement of Counsel to Refer Cause to Master.*

And afterwards, to-wit, on the 21st day of August, 1907, the following agreement of counsel was filed in said court, in the words and figures following, to-wit:

In the United States Court within and for the Southern District of the Indian Territory, at Chickasha.

762.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Agreement of Counsel.*

It is hereby agreed by and between the plaintiffs and defendants in the above entitled cause that said cause may be submitted by the court to J. T. Blanton, Esq., of Pauls Valley, I. T. for hearing by Special Master, to make both his findings of facts and law and report the same to the Court.

Witness our hands this the 20th day of Aug. 1907.

BOND & MELTON,  
C. C. POTTER,

*Attorneys for Defendants.*

A. C. CRUCE,  
W. A. LEDBETTER,  
FRANK BAILEY,

*Attorneys for Plaintiff.*

Endorsed on back: Filed in open court Aug. 21, 1907. C. M. Campbell, Clerk.

195 *Journal Entry—Order of Reference to Master.*

In the United States Court within and for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Order of Reference.*

Now, on this, the 20th day of August, 1907, in open court came on to be heard the agreement of the parties to the above entitled and numbered cause, to refer this cause to a special master, and it appears from said agreement that said parties have agreed upon J. T. Blanton, of Pauls Valley, as Special Master to hear this cause and make his findings of facts and conclusions of law herein and with authority to pass upon both facts and conclusions of law and report the same to the court.

It is, therefore, considered, ordered and adjudged by the Court that in pursuance to said agreement, this cause is hereby referred to said J. T. Blanton, Esq., with authority to hear the same and make his findings and conclusions of facts as well as the law and report the same to this court.

It is further ordered that the Clerk furnish a transcript of the different orders made in said cause and forward the same, together with the papers herein to the said J. T. Blanton, at Pauls Valley, within five days.

J. T. DICKERSON, *Judge.*

196 Endorsed on face: O. K. Bond & Melton, C. C. Porter.  
Endorsed on back: Filed in open court, Aug. 21, 1907.  
C. M. Campbell, *Clerk.*

*Testimony, Oral and Documentary, Submitted to Master.*

The following testimony, oral and documentary, was submitted to and heard by the Master in Chancery, Hon. J. T. Blanton, on the hearing of said cause a transcript of which said evidence was afterwards, towit, on the — day of — 1907 filed in said United States Court in and for the Southern District of the Indian Territory, at Chickasha, as part of the records of this case; and afterward, towit, on the 6th day of March, 1909, filed in the District Court of Carter County, Oklahoma:

- 197 In the United States Court in and for the Southern District,  
Indian Territory, at Chickasha.

No. 752.

F. E. RIDDLE, Plaintiff,  
vs.  
W. D. BELL et al., Defendants.

It is hereby agreed that the following constitute all of the testimony offered in behalf of Contestants and Contestees in Contest case No. 1784, involving the title to Lot Number three, Block Forty six in the town of Chickasha, Indian Territory, entitled E. B. Johnson and H. B. Johnson, Contestants, vs. F. E. Riddle and Matt Cook, Contestees, except a certain agreement entered into on the first day of January, 1902 between J. P. Ellis and H. B. Johnson, and copied in the opinion of the United States Indian Inspector for the Indian Territory hereinafter set out, on pages 19 and 20 of said opinion, heretofore pending before the United States Indian Inspector, the Commissioner of Indian Affairs and the Secretary of the Interior.

- 198 Before James L. Allen, Law Clerk for U. S. Indian Inspector,  
at Chickasha, I. T., May 26, 1906.

Contest Case No. 1784, Involving Title to Lot 3, Block 46, in the  
Town of Chickasha, Chickasaw Nation, Indian Territory.

E. B. JOHNSON and H. B. JOHNSON, Contestants,  
vs.  
F. E. RIDDLE and MATT COOK, Contestees.

C. M. Fechheimer, Attorney for Contestants.  
A. C. Cruce, F. M. Bailey and W. A. Ledbetter Attorneys for  
Contestees.

*Agreement.*

In the matter of the application of E. B. & H. B. Johnson and F. E. Riddle and Matt Cook to have schedule- to them lot 3, block 46, in the town of Chickasha, Chickasaw Nation, Indian Territory, it is admitted by all the parties to this suit that lot 3, in block 46 mentioned in the case of Fitzpatrick vs. Ellis and mentioned in the judgment in said case in the United States Court for the Southern District, Indian Territory, at Chickasha and in the opinion of the United States Court of Appeals for the Indian Territory in the case entitled Ellis vs. Fitzpatrick and reported in 64 S. W. Reporter, and the lot 3, in block 46 in the case of Ellis vs. Fitzpatrick reported in Vol. 55 of the Circuit Court of Appeals' Reports is the lot in controversy in this proceeding.

- 199 It is agreed by the parties hereto that all the documents attached to the application of E. B. & H. B. Johnson may be

admitted in evidence, but the competency and relevancy of which is objected to by the contestees.

D. D. SAYER, being first duly sworn testifies on behalf of contestants, as follows:

By FECHHEIMER:

Q. State your name, residence and occupation?

A. D. D. Sayer, Chickasha, I. T. and am President of Bank of Commerce.

Q. How long have you resided in Chickasha?

A. Thirteen years.

Q. What was your occupation in the year of 1897 up to 1904?

A. Attorney.

Q. Do you know anything concerning the litigation in reference to lot 3, block 46 in the town of Chickasha, I. T.?

A. I do.

Q. Did you represent any of the parties to the suit in reference to this lot?

A. Yes sir, the firm of Beavers & Sayer, of which I was a member, representing Theodore Fitzpatrick.

Q. Were you representing this party in the year of 1902?

A. I was.

Q. Do you remember the occasion of the Townsite Commission for the Chickasha Nation coming to the City of Chickasha, I. T. in 1902?

A. I do.

200 Q. Do you remember what month they were here?

A. I think it was about the first of February when they came.

Q. In the month of February did you appear before the Townsite Commission in regard to lot 3, block 46?

A. I did.

Q. State what you did and how you came to appear before them?

A. I appeared in the capacity of an attorney and acting at the special instance and request of Mr. R. M. Bourland, who was interested in the property, I wanted to see that it was schedule- properly.

Q. Did you see the record and notice how it was schedule-?

A. I did.

Q. In what way was it scheduled?

A. Schedule- "In litigation."

Q. Was the property in litigation at that time?

A. It was in litigation on appeal.

Q. In what court?

A. The United States Circuit Court of Appeals at St. Louis.

Q. Do you know who owned the improvements on that lot in February and March, 1902?

Contestee objects for the reason it is incompetent irrelevant and immaterial.

The COURT: The objection is overruled.

Q. Do you know?

A. I do.

Q. Who?

A. The plaintiff in this suit.

201 By ALLEN:

Q. Which suit?

A. The Theodore Fitzpatrick suit that was pending to determine the ownership of that property.

Contestees object to the answers of the witness for the reason it is a flat contradiction of the judgment itself.

No ruling.

Q. My, Sayer, did you, as attorney for the plaintiff, Theodore Fitzpatrick and his successors in interest, Bourland and Cross, have a writ of restitution issued in that action?

A. Yes sir.

Q. Do you know to whom the property was delivered under the writ — restitution?

A. I do.

Q. To whom?

A. M. M. Beavers.

Q. Who was Mr. Beavers?

A. He was attorney for the plaintiff.

Q. Associated with you in the case?

A. Yes sir.

Q. After it was turned over to Mr. Beavers did he turn it over to Bourland and Cross the successors to Mr. Fitzpatrick?

A. He did.

Q. It was turned over under the order of court in this proceeding pending here in Chickasha?

A. Yes sir.

202 Cross-examination by Mr. LEDBETTER:

Mr. Sayer, you stated just now that the improvements on the premises in controversy at the time named in Mr. Fechheimer's question belonged to the plaintiff in this contest, you based that statement upon your understanding of the effect of the judgment in the unlawful detainer action.

A. Yes, sir.

Q. And for no other reason?

A. Yes sir.

By Mr. FECHHEIMER:

Q. The parties to this suit at present are E. B. & H. B. Johnson, you mean you understood the ownership to be in their grantors, Bourland and Cross and Fitzpatrick?

A. Yes, sir.

Cross-examination by Mr. LEDBETTER:

Q. You bought that suit, did you not, Mr. Sayer

A. Yes, sir.

Q. You filed an amended complaint in that suit, did you not?

A. I think so.

Q. Did you not allege in that suit that the plaintiffs were not the owners of any improvements whatever on that lot?

A. Yes sir, I think so.

Q. And yet, you swear now that the effect of the judgment was to pass title to the improvements upon that place?

A. Yes sir, I do.

203 ROY G. BRADFORD, being first duly sworn, testified, as follows:

Direct examination by FECHHEIMER:

Q. State your name, residence and occupation?

A. Roy G. Bradford, and I am at present engaged in the laundry business and live at Ardmore, I. T.

Q. What business were you engaged in during the years 1901, 1902 and 1903?

A. In 1902 I went to work for the Townsite service for the Government.

Q. In what capacity?

A. As Townsite Clerk?

Q. As Townsite Clerk did you come to the town of Chickasha, I. T.?

A. Yes sir.

Q. When did you come here in that capacity?

A. On the 8th day of February.

Q. In what year?

A. 1902.

Q. Do you remember the circumstances in regard to listing lot 3, block — in the town of Chickasha, I. T.?

A. I remember the circumstances of listing the lot next to the Bank on the corner, The First National Bank property.

Q. How was that lot listed?

A. Mr. Kelsey was my assistant and in going over the property, we simply marked down who was the owner of the improvements.

204 We came to the first lot and that was listed to one Johnson and the second lot was listed to one Johnson, and in speaking about the third lot, something was said about the third lot being in litigation or contest, and to the best of my recollection it was passed over at the time, and later on in conversation with Mr. Sayer I was informed that the lot was in litigation and I so marked it on the schedule. I also think but I am not sure and could not swear to it, that I had a conversation with Mr. Riddle in regard to the matter, and also Mr. Hamilton in the office one day. I think I was sitting in my office and Mr. Hamilton was across the hall and we got to talking about this lot and whether I should mark it in contest or in litigation.

Q. How did you mark it?

A. I marked it "In litigation."



Q. Was it so marked in litigation when you left Chickasha with the records?

A. As far as I know it was.

Q. You did not change it?

A. No sir.

Q. Did Mr. Riddle ask you to do anything in reference to the lot?

A. I had a conversation with him, something about the lot, but what it was I could not swear to.

Q. But you listed it in litigation?

A. Yes sir.

Q. Do you remember whether or not Mr. Riddel appeared before you at that time in the capacity of an Attorney or as owner of the lot?

205 A. As an attorney.

Q. Attorney for whom?

A. I could not say.

Q. Attorney for one of the parties?

A. Yes sir.

Q. Did you ever see that letter before (hands him a letter).

A. Yes sir, this is my initial; and indicated that I wrote it myself.

Q. At the time in this letter was written the circumstances were fresh in your mind?

A. Yes sir.

FECHHEIMER: I desire to introduce this letter dated Sept. 30, 1902, and marked Exhibit 1.

No objection, it is admitted.

Q. You never schedule- this lot to Riddle & Cook, did you Mr. Bradford?

A. No sir.

By ALLEN:

Q. Mr. Bradford, at the time you schedule- the lots in Chickasha did you ascertain whether or not there were any improvements upon the lots?

A. Yes sir.

Q. Were there any improvements on lot 3, block 46?

A. To the best of my recollection there was a frame building.

Q. Describe the building as best you can?

A. All that I could see was just the front of it. It was a  
206 frame building and had a square boxed front; just built up square.

Q. Was it occupied?

A. Yes sir.

Q. For what purpose?

A. I think there was a notion store, they had some dry good- or something in there. I saw just the front.

Q. Who owned that building?

A. I do not know.

Q. Did you make any inquiry?

A. No sir, I was informed by an attorney that the lot was in litigation, and I believe if the application could be found, they will find an application with a notation on the bottom of it in regard to the matter signed by one of the parties who claimed to be the owner of the improvements.

No cross-examination.

H. J. JOHNSON, being first duly sworn, testified, on behalf of contestants, as follows:

By FECHHEIMER:

Q. State you- name, age, residence and occupation?

A. Henry B. Johnson, Chickasha, I. T., age 36, and am a banker.

Q. Where di- you reside in the year of 1903?

A. Chickasha, I. T.

Q. Did you purchase lot 3, block 46 in the year 1903 from any person?

A. Yes sir, purchased lot 3, block 46, in Chickasha from R. M. Bourland and J. E. Cross.

207 Q. Did you receive a conveyance to that property from them?

A. Yes sir.

Q. Who had possession of the property when you purchased it?

A. R. M. Bourland and J. E. Cross.

Deed is offered in evidence.

Contesstees object to the introduction of the instrument for the reason it bears date long after the lot was schedule- to F. E. Riddle and Matt Cook and for the further reason it only purports to be a whatever in the premises and it is not whosn that the grantors had an the premises and it is not whosn that the grantors had any tight whatever in the premises in controversy or the imrp-vement- situated thereon and for the further reason that in the amended complaint in the record filed in evidence there was an express disclaimer and allegation that they did not own the imrp-vement- situated upon the premises.

Court: The objection sustained and excepted to.

Q. Mr. Johnson do you know who claimed to own those improvements in the spring of 1902?

A. Mr. Bourland and Mr. Cross claimed them.

Q. Who owend them in the spring of 1903 when you purchased this property?

Contesstees objects for the reason it is incompetent and immaterial.

The objection is overruled.

A. R. M. Bourland and J. E. Cross.

Q. Mr. Johnson, before purchasing this property from  
208 Bourland and Cross, did you investigate whether Bourland  
and Cross owned the improvements on the lot and had the  
right to sell same?

Contestees objects on the ground that his action in making the investigation is wholly incompetent and does not tend to prove that the contestants did not own the improvements situated upon the lot at the time, nor does it tend to prove that Bourland and Cross owned the improvements; whatever Mr. Johnson might have done does not prove anything. It is also objected to because it relates to a period of time subsequent to the schedule of the property.

Court: The objection is sustained and excepted to.

Q. Did you have a building erected a bank building on lots 1 and 2, block 46, in Chickasha, I. T., in the year 1901?

A. Yes sir.

Q. Did you build part of the west wall of the property on lot 2 on lot 3 in Block 46?

A. Yes sir.

Q. That was 1901?

A. Yes sir.

Q. At the time that wall was built who claimed to own the improvements on lot 3, that is prior to the time the townsite commission came?

A. I entered into an agreement with R. M. Bourland and J. E. Cross that if they won the suit that was pending on that lot and the improvements that they were to pay me for an interest in the wall.

209 Q. Then this improvement was on that lot under contract with Bourland and Cross at the time the Townsite Commission was here?

A. Yes sir.

Q. Did Mr. Riddle ratify that agreement at that time?

A. I think so.

Q. Did Mr. Bourland and Mr. Cross ever pay you for that half wall on that lot?

A. That was part of the consideration when I purchased the lot.

Q. They gave you credit for the amount of that wall?

A. Yes sir.

Cross-examination by Mr. LEDBETTER:

Q. Where is that agreement?

A. I guess Mr. Bourland has it.

Contestees prays to exclude the testimony of the witness as to the written contract under which the improvements were placed on part of lot 3, for which reason oral testimony is not competent to show the contents of an agreement or the effect of the contract.

Court: It may be excluded.

By FECHHEIMER:

Q. Do you know whether that contract was in writing or not?

A. Yes sir.

Q. Have you ever had it in your possession or under your control?

A. I never had it. It was a contract I signed with them.

Q. If you were successful in the litigation at that time  
210 you were to pay for that wall?

A. Yes sir.

Q. Has that contract been in your office or possession?

A. No sir.

Q. Do you know who has got it?

A. I know Mr. Bourland did have it, but Mr. Riddle probably has a copy of it—he was attorney for Ellis.

Contestees at this time offer in evidence and ask that it be copied in the record deposition of Theodore Barnhart in case pending in the U. S. Court of the Southern District of the Indian Territory, at Chickasha, styled F. E. Riddle et al., plaintiffs vs. W. D. Bell et al. defendants.

Contestants objects to the introduction in evidence of this deposition for the reason it was taken in a case in which the contestants E. B. & H. B. Johnson are not parties, were not present when the deposition was taken and had no opportunity to examine or cross-examine the witness.

Ledbetter for contestees: This deposition was taken in an ejectment suit filed by F. E. Riddle and Matt Cook against R. M. Bourland and others, the parties through whom Johnson and Johnson claim title, and upon an agreement with Mr. Carmichael who was representing the Johnson interest in said ejectment suit, and Mr. Carmichael was present to cross-examine the witness at attorney for

Mr. Johnson's interest, representing his interest through  
21 Bourland and Cross the defendants in that suit. Said deposition filed by the Clerk May 13, 1904, in case 762.

J. W. SPEAKE being first duly sworn testified on behalf of contestees as follows;—

Q. State your name, occupation, your official position if you hold any.

A. J. W. Speak, Deputy Clerk United States Court at Chickasha.

Q. Are you the custodian of the records of this court?

A. Yes sir.

Q. Is there a case impending in this court No. 752 styled F. E. Riddle et al. vs. W. D. Bell et al. wherein Bourland and Cross are parties defendants?

A. Yes sir.

Q. I will ask you to state whether or not the deposition you hold in your hand is part of the files in that case?

A. It is.

Q. It has been properly filed with the records in that case?

A. Yes sir.

Q. State whether or not that is the suit of ejectment wherein the title and possession to lot 3, block 46 over by the First National Bank is involved?

Contestants objects for the reason the records is the best evidence.  
COURT: The objection is sustained.

Contestees now offer in evidence the same deposition.

Contestants objects to the deposition for the reason it is in a suit pending between F. E. Riddle, W. D. Bell, Thomas Sinclair, 212 James Rechief and Theo. Fitzpatrick and not in a suit wherein E. B. Johnson and H. B. Johnson, the contestants, are parties defendant, and for the further reason no notice of taking of said deposition was given to said Johnsons, and for the further reason that the litigation in which this deposition was taken was commenced February 2, 1903, after the title to the improvements and lot was in controversy and adjudicated by the United States Court for the Southern District of the Indian Territory and the Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals for the Eighth Circuit, and for the further reason that the deposition in controversy shows to have been taken May 13, 1904, after the contestants were in position and the owners of the improvements upon said property.

By ALLEN:

Q. Mr. Bailey were any of the parties to this suit grantors of the Johnsons?

A. Yes sir, Bourland and Cross, which is shown by the record.

COURT: The objection to the introduction of the deposition is overruled and excepted to.

Contestants object to the further introduction of said deposition for the further reason that Bourland and Cross were not made party defendant in case No. 762 until February 13, 1903, after the title to the lot had been adjudicated by the courts, and for the further reason that the U. S. Indian Inspector and the Department of the Interior cannot go behind the adjudication of the courts in 213 reference to the schedule of this lot.

COURT: The objection is overruled. Excepted to.

Copy of said deposition is made part of the records hereof and is as follows;—

"In the United States Court within and for the Southern District Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiff,

vs.

W. D. BELL et al., Defendants.

The deposition of Theodore Barnhart taken at the office of the Bank of Lone Wolf at the town of Lone Wolf, O. T., by an agreement of both plaintiff and defendant before C. H. Griffith a notary public Kioaw County, Territory of Oklahoma, and it is agreed that

questions and answer of said witness may be written on the type-writer by E. C. Teappe, and each of said parties hereby waive any irregularity in the caption of certificate and agree that they may be mailed by the said notary to the Clerk of the Court at Chickasha, and agree to waive any formality as to the manner, time of mailing same as required by law. Both parties hereby reserve any exceptions to the materiality or competency of said evidence.

THEODORE BARNHART being produces to testify in behalf of plaintiffs and after first being sworn according to law testified as follows:—

Q. State your name, place of residence and occupation and age?

A. Theodore Barnhart, Lone Wolf, Coal Business and farmer, age 56.

214 Q. State whether or not you ever resided in Chickasha, I. T.?

A. Yes sir.

Q. State about the time you first went to Chickasha and about the time you left there?

A. Went there in the fall of 1892 and left in August, 1900.

Q. Mr. Barnhart state whether or not you were the owner of any improvements situated upon lot #3 in block #46 lot formerly claimed by Theo. Fitzpatrick?

A. I was.

Q. State about the character and value of those improvements?

A. About \$300. was the value of said improvements. It consisted of three rooms one room about 18 x 18, one room 15 x 16 and a room 10 x 12 and some other little improvements.

Q. State who erected those improvements upon said lot?

A. I bought and moved on to the lot one portion of the improvements, the remainder of the improvements I put there myself.

Q. Mr. Barnhart, state whether or not you ever made any contract or arrangements with Mr. Theo. Fitzpatrick whereby you leased the lot upon which said improvements were built and if so about what date.

A. I did. Sometime during the year 1892.

Q. Under your agreement and contract with Mr. Fitzpatrick state whose property the improvements placed and built upon said lot by you were to be?

A. They belong to me.

215 Q. Were said improvements or not under your agreement with Mr. Fitzpatrick to always remain and be your separate property.

A. Yes.

Q. State whether or not under your agreement with Mr. Fitzpatrick said improvement above referred to were to revert and to be the property of Mr. Fitzpatrick?

A. No sir.

Q. To whom did you sell said improvements if any one.

A. J. P. Ellis.

Q. About what year if your re-mber did you sell your improvements to Ellis?

A. In 1897 or 1898.

Q. Were they or not your improvements at the time you sold them to Mr. Ellis?

A. They were.

Q. State whether or not if under your contract with Mr. Fitzpatrick if there was anything to limit your right to dispose and sell said improvements to Mr. Ellis?

A. No sir.

— State whether or not there was any improvements of any character upon said lot at the time you placed and erected the improvements above described?

A. There was none.

Q. State whether or not if all the improvements that was upon said lots at the time you sold them to Mr. Ellis belonging to you?

A. Yes sir, they did.

216 Q. Now, if I understand you under your agreement with Mr. Fitzpatrick, the improvements above referred to were to always remain and be your separate property?

A. Yes sir, they were.

Q. Mr. Barnhart have you now got the written contract made between you and Mr. Fitzpatrick and if not do you know where it is?

A. No sir, I have not unless it is in the hands of Mr. Fitzpatrick. The lease was left in the hands of Mr. Cary. I never had a copy of the lease in my possession and I never saw it after I signed it.

Q. Mr. Barnhart who was Mr. Carey and state whether or not he had any business relation with Mr. Fitzpatrick?

A. He was in the mercantile business in Chickasha and a partner in business with Mr. Theo. Fitzpatrick.

Cross-examination by Mr. CARMICHAEL:

Q. Mr. Barnhart in your direct examination you testified that you entered into a rental contract for lot #3 in block #46, in the town of Chickasha, I. T., from whom did you lease this lot.

A. From Mr. Theo. Fitzpatrick.

Q. Who was the owner of and in possession of that lot at the time you entered into the contract?

Plaintiff objects to that part of the question that seeks to prove ownership of the lot for the reason that it calls for a conclusion of the witness and is immaterial and irrelevant.

A. Mr. Theo. Fitzpatrick.

217 Q. Was your contract with Mr. Fitzpatrick verbal or was the same reduced to writing?

A. There was a verbal contract after the first twelve months. It was a written contract for the first 12 months.

Q. Have you a copy of that contract?

A. I have not.

Q. Defendant here excepts to all those questions in the direct examination and moves to strike out the answers thereto that attempt to prove the terms of the rental contract between Theo. Fitzpatrick

and Theo. Barnhart, for the reason that the written contract is the best evidence.

Q. Mr. Barnhart I will ask you to state the exact term of the rental contract?

A. I leased lot #3 in block 46 for the term of 12 months at the rate of \$10.00 per month, with the privilege of longer, I do not remember whether or not the contract contained or covered a longer time of lease or the privilege of a longer time of lease of 12 months or not.

Q. Have you stated all the terms which the written contract contained?

A. I have stated the sum and substance of it so far as I remember.

Q. Then it is true Mr. Barnhart that the written contract said nothing whatever about the improvements is it not?

A. No sir, it is not true but I don't remember all of the written contract.

218 Q. Then what did it say?

A. I don't remember just what the written contract did contain, so far as the improvements are concerned but I suppose that it contained the clause that at the expiration of the term of the lease that I was to retain and remove from said lot my entire improvements in case Mr. Fitzpatrick demanded possession of the lot. The improvements were mine. I paid for them and it was always understood and agreed upon between Mr. Fitzpatrick and myself that when the time came that he wanted possession of his lot that I was to move my improvements off the lot.

Q. Isn't it a fact Mr. Barnhart that you do not know whether or not that written contract said anything about the improvements?

A. I don't remember.

Q. In your direct examination you testify that you sold the improvements on this lot to one, J. P. Ellis, what did Mr. Ellis pay you for them?

A. He pay me \$250.00 including a few butcher tools.

Q. Did that include all improvements and fixtures belonging to your butcher shop?

A. The most of them?

Q. Did you have any conversation with Mr. Ellis at the time you sold him these improvements with reference to the manner in which you were in possession of this lot, and the improvements thereon, if so state the substance of said conversation?

Objected to by plaintiff for the reason hearsay incompetent and immaterial.

219 A. Yes sir, I told him the lot did not belong to me but I could only sell him the improvements and that he could occupy the lot with the improvements I was satisfied if he would see Mr. Fitzpatrick in reference thereto to occupancy of the lot.

Q. Did you at that time tell Mr. Ellis that your contract with Mr.



Fitzpatrick was that you should deliver possession of said lot upon demand made by Mr. Fitzpatrick?

A. Yes sir, he bought the improvements with that understanding knowing he would have to remove them at any time Mr. Fitzpatrick should call for the possession of the lot.

Q. Did *my* Ellis subsequently to the time that he took possession of these improvements tell you that he was paying rent to Mr. Fitzpatrick?

Plaintiff objects to said question for the reason that it is hearsay and incompetent, irrelevant and immaterial.

A. He did in reference to the use of the lot and not the improvements.

Q. I will ask you Mr. Barnhart, if you did not when you sold the improvements rate the stand or right as lessee to conduct a butcher shop upon this lot as of some value.

Objected to by the plaintiff for the reason said question does not see an answer of any fact but a mere conclusion and opinion of the witness and for the further reason the same is immaterial, irrelevant and incompetent.

A. He bought the improvements at a reduced value.

220 Redirect examination by plaintiff:-

Q. Mr. Barnhart state whether or not that during the year of 1896 or 1897 that if business and times in Chickasha were not very dull, and that property in general was very cheap?

Objected to by defendant- for the reason that the same is irrelevant and immaterial.

Q. Mr. Barnhart, if I understand you correctly that under your agreement with Mr. Fitzpatrick that you were not obligated to move your improvements off of said lot until Mr. Fitzpatrick had demanded that of you or requested you to do so?

A. No sir I was not.

Q. State whether or not if at any time before you sold said improvement- if any demand or request was made of you by Mr. Fitzpatrick to remove said improvements.

Objected to by defendant- for the reason that the question is irrelevant and immaterial.

A. No sir, there was none.

Q. Then if I understand you under your agreement with Mr. Fitzpatrick you had a right to remove your improvements from said lot when he made a demand upon you to do so?

A. Yes sir or at any other time.

Defendant- objects for the reason that the same is irrelevant, immaterial and incompetent and for the further reason, that it calls for the conclusion of the witness.

221 Q. State whether or not it was agreed between you and Mr. Fitzpatrick that at any time you saw fit you had the right to remove your own improvements?

A. Yes sir.

Q. Mr. Barnhart in your cross-examination you stated that the contract for the first 12 months was in writing and you supposed it contained all of the provisions about the improvements between you and Mr. Fitzpatrick. Now I ask you whether or not to the best of your recollection these provisions in reference to the improvements were contained in the written contract.

A. They should have been.

Defendant- now moves to strike out the answer to the last question for the reason that the same is not responsive.

Q. The- state your best recollection about it?

Question withdrawn.

Q. I will ask you to state whether or not you and Mr. Fitzpatrick undertook to reduce to writing the actual agreement made as above testified to?

Q. That was the intention.

Q. State whether or not at the expiration of the first 12 months when you say you continued to hold lot under a verbal contract if you still kept in force and state if it continued to be the agreement between you and Mr. Fitzpatrick in reference to the ownership of the improvements placed on said lot by you and have testified about as above?

222 A. Yes sir the agreement was the same as to the ownership of said improvements.

Q. State whether or not if under the agreement between you and Mr. Fitzpatrick it was agreed that you should have the privilege and right to improve this lot as you did?

A. Yes sir.

Recross-examination by defendant:

Q. Mr. Barnhart in your re-direct examination you stated at the expiration of 12 months you continued in possession of the lot aforesaid under a verbal agreement of Mr. Fitzpatrick, I will ask you to state the exact terms of said agreement, the time the same was made, and who if any was present when you entered into the said agreement?

A. Practically the same contract except I paid less rent. There was no one present when the verbal contract was made that I remember of.

Re-redirect examination:

Q. Mr. Barnhart do you mean that the verbal contract you made at the expiration of one year was practically the same as the written contract or do you mean that it was practically the same as your agreement with Mr. Fitzpatrick which you say you supposed was all put in to writing?

Objected to by the defendant- for *thw* reason that the same is incompetent, irrelevant and immaterial and for the further reason that it has not been shown that the agreement referred to in said question was made subsequent to the time that the contract  
223 was reduced to writing.

A. Practically the same agreement that I had with him for the first year, only at a reduced rent.

Q. Mr. Barnhart, I will ask you that if for any reason that if any of the provisions in reference to your ownership of the improvements as you have testified above were not contained in the verbal contract, then state whether or not said verbal contract between you and Mr. Fitzpatrick which you say was made after the expiration of the first year contained said provisions as to your ownership and control of said improvements and that if said verbal contract was to take — place of any written contract for the first year?

A. Yes, the verbal contract contained all the provisions in reference to the improvements whether it was ever put in writing or not."  
(Signed) THEO. BARNHART.

Subscribed and sworn to before me this 12th day of May, 1904.  
C. H. WOLF,  
*Lone Wolf, O. T., Notary Public.*

Commission expires August 3, 1907.

TERRITORY OF OKLAHOMA,  
*Kiowa County, ss:*

I, C. H. Griffith a notary public within and for the county of Kiowa, Territory of Oklahoma do hereby certify that the deposition of Theo. Barnhart was taken before me on the 12th day of  
224 May 1904, at the office of C. H. Griffith in the building of the Bank of Lone Wolf in the town of Lone Wolf, Oklahoma Territory, as per the agreement of the said plaintiff and defendants, and that the said Theo. Barnhart was first duly sworn by me that the evidence he should give should be the truth, the whole truth and nothing but the truth, and that the questions propounded to said witness and his answers thereto were reduced to writing in my presene by E. C. Teape as per agreement of both plaintiffs and defendants, the said plaintiff and defendant each being present by attorney at the examination.

In testimony whereof I hereunto subscribed my name and affix my notorial seal in the town of Lone Wolf, Oklahoma, this 12th day of May, 1904.

(Signed)

C. H. GRIFFITH,  
*Notary Public.*

Contesstees now offer in evidence the answer filed in suit # 762 of R. M. Bourland and Ella Cross, grantors of contestants in this case; also first and sec-nd amended answers for the purpose only of showing when Bourland and Cross were made parties defendant, and ask that they be made a part of this record.

Contestants object for the reason that E. B. & H. B. Johnson were not parties to the suit.

The objection is overruled; Excepted to.

Copy of the answer, also first and second amended answers filed in suit 762 is made a part of the record hereof, a copy of which is as follows:

225

*Answer.*

In the United States Court for the Southern District of the Indian Territory, at Chickasha.

No. 762.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Answer of R. M. Bourland and Mrs. Ella Cross.*

Now comes R. M. Bourland and Mrs. Ella Cross who have been permitted by the court to make themselves defendants herein, and for answer to the plaintiffs' complaint herein they say:

That plaintiffs are now the legal owners and entitled to the immediate possession of the property and lot described in Plaintiffs' complaint; that plaintiffs have not been injured by the defendants herein as alleged by them in their complaint; nor did the defendant or any of them wrongfully repudiate any rental contract which they had with the plaintiffs in reference to said lot nor are the plaintiffs entitled to recover the rental value of said property.

That defendants further show that they are the legal owners of said property, and are in the lawful possession of the same; and they further show that on or about 7th day of July, 1898, the defendants, Theodore Fitzpatrick being then the owner of said property and entitled to the immediate possession of the same,

226 instituted a suit in this court to recover the same from J. P.

Ellis and to recover rent for the wrongful detention of the same; that said action was an action of unlawful detained, in which it was claimed by the plaintiff that the defendant was unlawfully holding over the expiration of his rental contract; and on the 20th day of October, 1900, this court rendered a judgment upon a verdict of the jury in favor of the said Theodore Fitzpatrick and not the property of the said J. P. Ellis, adjudging the said property to be the property of the said Theodore Fitzpatrick and not the property of the said J. P. Ellis; that said J. P. Ellis prosecuted an appeal in said case to the Court of Appeals of the Indian Territory, which court did on the 4th day of October, 1901, after affirmed the judgment and decision of this court in said case, but that the said J. P. Ellis did thereafter prosecute an appeal or writ of error from the said Court of Appeals to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, which court did on the — day

of —, 1902, duly affirm the said judgment and decision of the Court of Appeals of the Indian Territory and of this Honorable Court. That while said case was pending on appeal in the Court of Appeals for the Indian Territory and on the 8th day of April, 1899, the said Theodore Fitzpatrick joined by his wife, Maria Fitzpatrick did bargain, sell and convey all his interest in said lot and property described in plaintiffs' complaint to Mrs. Ella Cross, and copy of which transfer is hereto attached and marked "Exhibit A" and made a part of this answer.

227 That thereafter and on the 18th day of September, 1900 the said Mrs. Ellis Cross joined by her husband J. E. Cross, bargained, sold and conveyed to the defendant R. M. Bourland, an undivided one-half interest in and to said property, a copy of which transfer is hereto attached marked "Exhibit B" and made a part of this answer, whereby these defendants became jointly the rightful owners of all the right, title interest and claim of the said Theodore Fitzpatrick in and to said property as the same existed before the said legal proceedings against J. P. Ellis, and such as might accrue to him by virtue of said legal proceedings.

That said various judgments and decrees of the court adjudged said Theodore Fitzpatrick to be rightful and lawful owner, as against the said J. P. Ellis, of all the property in controversy including the title to the lot, the right to the possession of the lot and the improvements thereon.

That the defendant F. E. Riddle was one of the attorneys for the defendant J. P. Ellis in all the foregoing legal proceedings and represented him therein, that pending said litigation the said F. E. Riddle procured the said J. P. Ellis as defendants and informed to make to him and his co-plaintiff a transfer of his interest in and to said property which is the only title, claim or right which the said plaintiffs have or ever had in and to said property.

228 These defendants further show that when the Townsite Commission came to plat, lay off and schedule the town of Chickasha, the case of Fitzpatrick vs. Ellis, before alluded to, was pending in the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, as above set forth, and said lot was then in litigation by reason thereof, that when the said Townsite Commission came to plat and schedule the lot in controversy they first schedule- the same as in litigation, that defendants knowing that said lots should be schedule- as in litigation, and not schedule- to either party, never requested that it should be schedule- to them, but they examined into the disposition of the Townsite Commission was making of the same, and found that they had property schedule- the same as in litigation, thereby protecting the rights of all the litigants and giving neither one advantage. This action of the Commission was entirely satisfactory to these defendants and they gave the matter no more attention, but the defendants show that thereafter the plaintiffs wrongfully seeking an advantage of these defendants by some means unknown to these defendants, prevailed upon the townsite commission to erase their former schedule and to schedule the same to the plaintiffs, which was a mistake and error on the part of the Commission and was in fraud of the rights of

these defendants and was brought about and induced by the plaintiffs.

These plaintiffs in great haste to consummate their fraudulent scheme to cheat and defraud these defendants out of their title to said property, sent the purchase money for the payment of said lot to the United States Indian Agent for the Indian Territory who, not knowing of the fraudulent schemes and purposed of the plaintiff, accepted the same, but before patent was issued to the plaintiffs these defendants found out and ascertained that the scheduling of said lot had been changed without their consent or knowledge, protested against the issuance of said patent and notified the said Indian Agent of all the facts herein alleged and asked that said patent be not issued until the rights of the parties thereto could be investigated and determined; that said Indian Agent in obedience to said protest, has withheld and is still withholding the patent upon said land. Defendants allege that the plaintiffs acquired no right in and to said property by reason of their wrongful and fraudulent act aforesaid, but that these defendants are the rightful owners of said property and they pray that they be adjudged by this Honorable Court to be such, and that they be discharged with this cost.

(Signed)

BEAVERS, POTTER, BAREFOOT  
& CARMICHAEL,  
*Attorneys for Defendants.*

I, R. M. Bourland, do on oath state that the statement contained in the above and foregoing answer are true.

(Signed)

R. M. BOURLAND.

Subscribed and sworn to before me this 18th day of February, A. D. 190-.

C. M. CAMPBELL,  
*Notary Public.*

230

*Amended Answer.*

"In the United States Court for the Southern District of the Indian Territory, at Chickasha.

No. 762.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now comes R. M. Bourland and Mrs. Ella Cross, defendants herein and by leave of the court amend their answer filed herein on the — day of — 1903, so that the same shall read as follows, to-wit:

First. These defendants deny that the plaintiffs are the legal owners and entitled to the immediate possession of the property and lots described in plaintiffs' complaint they deny that the plaintiffs

have been injured by the defendants or any of them. They deny that the defendants or any of them wrongfully repudiated any rental contract which they had made with the plaintiffs. They deny that plaintiffs are entitled to recover the lot in controversy or to recover any rent for the use of the same. These defendants deny that said lot was rightfully schedule- by the townsite commission *go* the plaintiffs they deny that the plaintiffs were on the 28th day of June, 1898, or any *any* other time the legal owners of the improvements on said lot, or that they had the sold and undisputed right to purchase the same.

Second. These defendants further allege that they are the legal and equitable owners of the property mentioned and described in plaintiffs' complaint. The one Theodore Fitzpatrick was on the 7th day of July, 1898, the sole and rightful owner of the said property and had been for a number of years, therefore. That one J. P. Ellis had prior to said *last* named days occupied said land as the tenant of the said Theodore Fitzpatrick but some time before the 7th day of July, 1898, the said — repudiated his rental contract to said property and refused to surrender the same to the said Fitzpatrick and refused to vacate the same, but set up title within himself. That if the said Ellis ever owned the improvements situated on said lot he only owned the same as a tenant of the said Fitzpatrick and that such ownership of the improvements conferred upon the said Ellis no right to or ownership in the lot itself and he merely had the right, and only the right to remove the said improvements at the termination of his lease, but the said Ellis failed and refused to remove said improvements from said property but held possession of the same long after the termination of his lease and finally repudiated and denied his landlord's title in and to said lot as above stated.

Wherefore these defendants say that *is* said Ellis ever owned said improvements long before his sale of his interest in said property to the plaintiffs hereinafter shown, the said Ellis had forfeited all rights in and to said improvements and all rights to remove  
 232 the same and *and* all his rights to claim any benefit from his said ownership.

Third. These defendant- further show that the said Theodore Fitzpatrick on or about the 7th day of July, 1898 instituted an action of unlawful detainer against the said J. P. Ellis in the United States Court for the Southern District of the Indian Territory at Chickasha, to recover of him the possession of the said property in controversy and on the 20th day of October, 1900, the said United States Court rendered a judgment in said cause upon the verdict of the jury in favor of the said Fitzpatrick and against the said J. P. Ella, adjudging the said property of the *property of the* said Fitzpatrick and not the property of the said Ellis, and that said Fitzpatrick was rightfully entitled to the possession of the same at the time of the institution of said suit, and that said Ellis was then wrongfully holding said property after the expiration of his rental contract. That the said Ellis prosecuted *and* appeal from said judgment to the United States Court of Appeals for the Indian Territory, which court did on or about the 4th day of October, 1901,



affirm the judgment of the said United States Court at Chickasha, but that said Ellis did thereafter prosecute a writ of error to said court of appeal from the United States Court of Appeals for the Eighth Circuit at St. Louis, which court did on the — day of —

1902, duly affirm the judgment of the said two lower courts.

233 Fourth. That during all the time said suit was pending the defendant retained possession of said property by executing the proper bond for that purpose until he sold the same to the plaintiffs herein which he did at some time during the pendency of said suit but just when the said transfer was made this plaintiffs is not advised nor do they know the exact nature of said transfer, but they allege that the plaintiff F. E. Riddle was one of the attorneys for the said J. F. Ellis, and had full knowledge of all the rights of the said Theodore Fitzpatrick to and to said property and all the lack of right or interest in said property by the said Ellis, and that the only right or claim to said property which the plaintiff ever acquired they acquired from the said Ellis pending said suit.

Fifth. These defendants further allege that the said Ellis and the plaintiffs his assignees are fully concluded and estopped by said judgment from setting up the ownership of the said Ellis or of the said plaintiffs in and to said improvements on said lots. That if the ownership of the said improvements was not directly and formally made an issue in said case the same were at the time a part of the realty and the adjudication or the ownership of the lot carried with it the ownership of the improvements and if this should not be the case, defendant further show that whatever ownership the said Ellis ever had in and to said improvements grew out of his rental

234 contract relating to said lot, and he could and should have set up his ownership in the same and in the said action of unlawful detainer and having failed to do so he and his assignees are forever precluded and estopped from asserting such ownership.

Sixth. These defendants further show that during the pendency of said suit and on the 8th day of April, 1899, the said Theodore Fitzpatrick joined by his wife sold and transferred to the defendant Mrs. Ellis Cross a copy of which transfer is hereto attached and marked Exhibit A and made a part of this answer. That thereafter on the 18th day of September, 1900 the said Mrs. Ella Cross joined by her husband J. E. Cross and sold and transferred an undivided one half interest in and to said property to the defendant R. M. Bourland a copy of which transfer is here to attached and marked Exhibit "B" and made a part of this answer by virtue of which transfer these defendants became jointly the rightful owners of all the right, title interest and claim of the said Theodore Fitzpatrick in and to said property. That from the date of said transfer the said Theodore Fitzpatrick continued to prosecute the said suit against J. P. Ellis for the use and benefit of these defendants, and the said various judgments obtained by the said Fitzpatrick in the progress of said — inured to the benefit of and became the judgments of these defendants?

235 Seventh. These defendants further show that when the townsite commission for the Chickasaw Nation came to lay out and plat the town of Chickasha and schedule the lots



therein the case of Fitzpatrick vs. Ellis before alluded to was pending in the United States Circuit Court of Appeals for the 8th Circuit of St. Louis and said lot was then in litigation by reason thereof. That when the said Commission came to schedule the lot in controversy they first schedule the same as "in litigation" which it was their duty to do, it being the rule and custom of said commission where there were two claimants to a lot and the same was in litigation to schedule the same in that way until the litigation to schedule the same in that way until the litigation was termination. That these defendants who had then succeeded to all the rights of the said Fitzpatrick in and to said lot; knowing that said lot should be scheduled as "in litigation" thereby protecting all the interest of all parties and giving neither parties any advantage; which being entirely satisfactory to these defendants they gave the matter no further attention. But the defendants show that thereafter the plaintiff wrongfully seeking the advantage of these defendants did by some unknown means to these defendants revail upon the townsite commission to erase their former schedule and to schedule the same to the plaintiffs, which was an erroneous and unlawful act on the part of the said commission. As the plaintiffs were not the

236 owners of said lot or said improvements and had no right to have the same scheduled to them and such action was in fraud of the rights of these defendants and was brought about and induced by the plaintiff. And to further obtain an advantage over these defendants the plaintiffs secretly and in great haste forwarded the money to pay the appraised value of said lot to the United States Indian Agent at Muskogee, who being ignorant of the real facts and now knowing of the plaintiff's fraudulent schemes to wrongfully procure title to said lot accepted said purchased money. But before the patent was issued to the plaintiffs these defendants ascertained that the scheduling of said lot had been changed without their knowledge or consent, protested against the issuance of said patent and notified the Indian Agent of all the facts herein alleged and asked that the said patent should not issue until the rights of the parties thereto should be investigated and determined and said litigation concerning said lots ended. And in obedience to said protest said Indian Agent withheld and in still withholding the patent to said land, and has officially notified these defendants that no action will be taken until the court decide the controversy now pending in this suit.

Eighth. Defendants further show that it was one of the purposes of the said Fitzpatrick in bringing said action for the possession of said lot that he might — the same so as to secure the rights of an owner of an improved lot to purchase the same at the government sale of said lot. But the said Ellis by the wrongful defense of said action and the wrongful failure to surrender the

237 possession of the said lot to the said Fitzpatrick and by prosecuting of the wrongful appeals aforesaid prevented the said Fitzpatrick and these defendants from getting possession of said lot until after the wrongful acts of the plaintiff in procuring the erroneous scheduling of said lot to themselves was committed

that it was likewise the intention of these defendants when they purchased the said lot from the said Fitzpatrick as aforesaid to improve the same as soon as they could get possession, but the said Ellis by wrongfully availing himself of the law's delay and by the prosecution of the said appeal and writ of error continued to keep the wrongful possession of said lot until the same was schedule- and sold as above stated.

That as soon as the mandate from the Circuit Court of Appeals of the 8th Circuit was returned to this court in the said case of Fitzpatrick vs. Ellis, a writ of restitution was issued thereon and these defendants were by the marshal of this court's action under said writ placed in the possession of the property in controversy and it is out this rightful possession of these defendants that this suit is brought for these defendants soon after they were placed in possession of said property as aforesaid rented the same to the other defendants herein except the defendant Fitzpatrick.

Ninth. These defendants further show that it was never the intention of the said Fitzpatrick nor of these defendants to  
 238 abandon their right and ownership in lot, or permit the same to be sold to another, but it was at all times their purpose and intention to improve said lot and buy the same when sold by the townsite commission and they have been permitted from doing this only by the wrongfully acts of the said Ellis and the plaintiffs. That the said Fitzpatrick and these defendants have been as diligent in the prosecution and the protection of their rights in and to said lot as it was possible for them to be without taking the law in their own hands and forcibly ejecting the said Ellis and the plaintiffs therefrom. That these defendants are willing to repay to the plaintiffs whatever sum they have paid to the government for the purchase price of said lot and they here now tender to the plaintiffs the sum of \$375, which is 62½% of the appraised value of the said lot and the full amount paid by the plaintiffs as aforesaid?

Wherefore these defendants say that they have at all times been the rightful owners of said lot and entitled to purchase the same and to have the same schedule- to them. That the plaintiffs have no right or interest in said lot no right to have the same schedule- to them, and no right to purchase the same, except as alleged right acquired through their own wrong and the wrong of the said Ellis, and defendants pray that they be adjudged the rightful owners of the said lot and that whatever apparent right or title the plaintiffs have acquired by the erroneous scheduling of said lots  
 239 be divested out of them and vested in these defendants and that they be quieted in their title and possession of said lot, and that they have all other such and further relief either in law or in equity as they may show themselves entitled to.

(Signed)

POTTER, BAREFOOT &  
 CARMICHAEL,

*Attorneys for Defendants, Bourland and Cross.*

*Second Amended Answer.*

"In the United States Court for the Southern District of the Indian Territory, Sitting at Chickasha, December Term, 1905.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now comes the defendants, R. M. Bourland and Mrs. Ella Cross and beg leave of the court to amend their former answer herein and in answer to the amended complaint filed by the plaintiff on the date allege as follows:

First. These defendants deny that the plaintiffs are the owner, either legal or equitable of the lot described in their amended complaint; they also deny that plaintiffs are *abducted* to the immediate possession of said lot; they deny that plaintiffs are now or ever *was* the owners of the improvements situated thereon, and deny that they had any right to have the same scheduled to them. Defendants also deny that the bill in equity alleged to have been filed by the plaintiffs in this case on the 15th day of July, 1902 was dismissed by plaintiff after issue joined, or that defendants are in any way precluded thereby from setting up their title to said lot in this action.

Second. Defendants further answering herein allege that one Theo. Fitzpatrick then being the owner of the lot mentioned in plaintiffs' complaint together with all the improvements thereon situated, instituted an action of unlawful detainer against one J. P. Ellis in this court on or about the 7th day of July to recover from him the possession of said lot. Said *counsel* being numbered 267, on the docket of this court, that said case was tried on the amended complaint of the plaintiff Theo. Fitzpatrick, a copy of which is hereto attached and marked "Exhibit A" and made a part of this answer and on the amended answer of the defendant, J. P. Ellis, a copy of which is hereto attached and marked "Exhibit B" and made a part of this amended answer. That on the 21st day of October, 1902, said cause of Theo. Fitzpatrick vs. J. P. Ellis was duly tried in this court and a judgment rendered, a copy of which judgment is hereto attached and marked "Exhibit C" and made a part of this amended answer. From which judgment the

241 said J. P. Ellis prosecuted an appeal to the United States Court of Appeals for the Indian Territory, sitting at McAlester, Indian Territory, which court duly affirmed said judgment, and from the said judgment of the Court of Appeals for the Indian Territory, the said Ellis prosecuted a further appeal on writ of error to the Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis, which court also affirmed both of the judgment- of this court and the court of appeals. That the said J. P. Ellis superseded the said judgment of this court and of the court of appeals for the Indian Territory, by giving supersed-as bond and was then enable-

to retain possession of said lot pending said appeals; that after the institution of said suit Theo. Fitzpatrick against J. P. Ellis, the said Fitzpatrick joined by his wife, conveyed and transferred said lot to Mrs. Ella Cross on the 8th day of April, 1899, a copy of which transfer is hereto attached and marked exhibit "D" and made a part of this amended answer. And that on the 18th day of September, 1900, the said Mrs. Ella Cross, joined by her husband J. P. Cross conveyed an undivided one half interest in said lot to the defendant R. M. Bourland. A copy of which transfer is hereto attached marked exhibit "E" and made a part of this answer. That from and after the execution of said deed from Theo. Fitzpatrick and his wife to Ella Cross he continued to prosecute the suit of Theo. Fitzpatrick against J. P. Ellis, for the use and benefit of these defendants and the judgment rendered in said cause though in the name of Theo. Fitzpatrick in fact inured to the benefit and was the judgment of these defendants. That by reason of said judgment and the transfers aforesaid, these defendants became the owners of the said lot, together with all the improvements thereon and were entitled to the immediate possession thereof.

Third. That by reason of said suit of Fitzpatrick against J. P. Ellis, the judgment therein rendered, the defendants became the owners of the improvements on said lot and the said J. P. Ellis and any one claiming under him were thereby estop-ed and concluded from setting up any claim to said improvements, because the ownership thereof and the right to possession thereof had been adjudged to these defendants by the judgment in said cause; that said improvements were not specifically mentioned in said judgment or if the ownership thereof was not specially made an issue in this cause, still the ownership thereof was a proper issue to be made in said cause and could ans sho-ld have been made in said cause, and the failure to make the same an issue on the part of the said Ellis estopped and precluded him and his privies from again asserting any title to said property.

Fourth. These defendants further say that if the said Ellis eved did own said improvements or any interest therein, he abandoned, waived and forfeited the same by denying the title of the said Fitzpatrick to said lot, and by *requesting* and denying the rental contract under which he held said improvements, and by wrongfully claiming to be the owner of said lot himself, and by refusing to remove said improvements from said lot for such long time after the term of his said lease ex-ired, and that after said refusal, denials and waivers the said Ellis and his privies could not again assert the right to remove said improvements from said lot and said improvement did in fact and in law become fixtures upon said lot and a part of said realty and the property of the owner of said lot.

Fifth. That if the plaintiff- or either one of them ever had or acquired any interest in said improvements they acquired the same from the said J. P. Ellis pending the litigation aforesaid between him and the said Fitzpatrick and with full knowledge both actual

and constructive of the rights of the said Fitzpatrick and of these defendants in and to said lots and improvements and with full knowledge of the waivers, refusal and forfeitures of the said Ellis heretofore set out.

Sixth. These defendants further allege that if the plaintiff- have any transfer or assignment from the said J. P. Ellis to his interest in the improvements on said lot dated prior to the institution of the suit of Fitzpatrick against- Ellis then they say that the plaintiff- ought not to be allowed to avail themselves of said trans-  
 244 fer or assignment in this controversy, for the reason that they have continuously suppressed the same and held the said J. P. Ellis out *of* the world as the owner of said improvements, that the said Ellis was in possession of said lot claiming to be the owner of said improvements at the time of the institution of said original suit and continued to remain in possession and control of the same until excluded therefrom by the process of this court upon the confirmation of the judgment *was* was about the 1st of January, 1903; that during all of said litigation the said F. E. Riddle was the attorney for the said J. P. Ellis asserting the right of the said J. P. Ellis to remain in possession of the said lot, and that the said J. P. Ellis was then the owner of said improvements, that said pleadings were filed as late as the October Term, of this court in 1900, and that upon the trial of the said *cause*, the said Riddle has the said Ellis to swear that he was then the owner of the said improvements and that since the institution of this suit, the said Riddle has taken testimony of the said Ellis and had him to swear that he, Ellis, was the owner of the said improvements up to as late as June, 1902, and for the reason the plaintiffs are as much bound by the judgment in the case of Fitzpatrick as Ellis himself.

Seventh. These defendants further allege that they purchased said lot from Theo. Fitzpatrick, they knew nothing whatever of  
 245 any claim of the said Riddle in or to the improvements to said lot, they have paid for said lot without ever knowing said fact that the first time these defendants ever heard that the plaintiffs herein were claiming any interest *un* said improvements was when they learned that the townsite commission had schedule- the lot in controversy to them on the ground that they owned said building.

Eighth. These defendants further show that it was their intention when they purchased said lot from Fitzpatrick to erect valuable permanent and substantial improvements thereon in the way of building as soon as they could obtain possession of the same, and to purchase said lot when it was placed on sale *by* the townsite- commission they were prevented from carrying these *purposed* into effect by the wrongful acts of the defendant Ellis, acting under the advice and direction of the plaintiff Riddle, in appealing from the judgment of *-his* court in said *cause* of Fitzpatrick against Ellis and superseding the said judgment and for the further reason that *this* alone these defendants were prevented from erecting their said substantial and permanent improvements on said lot and were never able to place any further improvements on said lot from the date of their said purchase except that in early part of the year 1901, these defendants and the said J. P. Ellis acting under the direction and advice of

the said Riddel entered into an agreement with the first  
 246 National Bank of Chickasha, I. T. that said Bank might erect  
 e brick wall for a two story building along the eastern line  
 of said lot, placing one half of said wall on said lot which should be-  
 come a part of said lot, and belong to the right owners thereof. And  
 that as soon as the said cause of Fitzpatrick against Ellis was finally  
 determined, that the successful party in that litigation should pay  
 to the first National Bank the sum of seven hundred and fifty dol-  
 lars, the same being one half the cost of erecting the said brick wall.  
 That said bank did in the early part of the year 1901, erect said  
 wall upon said lot and as soon as said litigation was finally determined  
 or in the early part of the year 1903 these defendants did pay to the  
 said First National Bank of Chickasha, the said seven hundred and  
 fifty dollars so expended by defendants—further say that when  
 the townsite Commission came to *law* off the plat and *may* of the  
 said town of Chickasha into street-, alleys, lots and block- the said  
 litigations in reference to the lot in controversy in this cause was  
 still pending and it was the duty and intention of said Town-  
 site Commission to schedule said lot in controversy not schedule  
 the same to any one at all until said litigation was finally de-  
 termined, that in pursuant to its duty and intention the said  
 townsite commission did first schedule said lot as in litigation,  
 and did not schedule the same to any one; that these de-  
 247 fendants knew that said lot was properly schedule- as in  
 litigation and not schedule- to any one by the commission-  
 ers that after these defendants had learned that this lot had been  
 schedule- as in litigation, knowing that this was proper these de-  
 fendants did not give the matter any further attention, and later  
 and without the knowledge of these defendants, the plaintiffs by  
 some means unknown to these defendants induces the said Townsite  
 Commissioners to change its first schedule and schedule said lot  
 to them; that as soon as these defendants learned that said  
 lot had been schedule- they filed a protest with the Hon. J.  
 B-air Schoenfelt, United States Indian Sgent, protesting against the  
 issuant- of any patent to said lot to the plaintiffs; that in recognition  
 of said protest, the said Shoenfelt had held up the patent to said  
 lot and will continued to do so until this controversy between the  
 plaintiff- and defendants, as to the ownership of said lot has been  
 fully determined.

Tenth. These defendants further say that by reason of their  
 ownership of said lot and of said improvements and by reason of the  
 judgment afforesaid and by reason of their placing a brick wall on  
 the lot which is a valuable, substantial and permanent improvement,  
 other than temporary building, fencing and tillage of the soil,  
 248 and would have itself entitled these defendants to the right  
 to purchase said lot and have the same schedule- to them, they  
 had and have the prior right to purchase said lot as an improved lot;  
 that the action of the townsite Commission in scheduling said lot  
 without the knowledge of these defendants and without giving them  
 an opportunity to present their rights to the Commission —, which



mistake and wrong was brought about and induced by the action of the plaintiff- herein.

Eleventh. That if the plaintiffs have actually paid the purchase price of said lot these defendants are willing and ready to repay same and do hereby offer to make said payment as soon as the rights acquired by such payment *on* transferred to these defendants.

Wherefore defendants prays judgment.

(Signed)

POTTER, BAREFOOT AND  
CARMICHAEL,  
*Attorneys for Defendants.*

INDIAN TERRITORY,  
*Southern District:*

R. M. Bourland of lawful age having first been duly sworn on oath states that he is *onw* of the defendants in the above styled and entitled cause, and that he has read the foregoing amended answer, and that the allegations set forth therein are true as he verily believes.

249      Subscribed and sworn to before me on this the 12th day  
of Dec. 1905.

\_\_\_\_\_  
*Notary Public."*

"EXHIBIT A."

In the United States Court for the Southern District of the Indian  
Territory, Sitting at Chickasha.

THEO. FITZPATRICK, Plaintiff,

vs.

J. P. ELLIS et al., Defendants.

*Second Amended Complaint.*

Now comes Theo. Fitzpatrick, plaintiff herein and by permission  
of court first had and obtained, files this his amended complaint, and  
**says;**

That on or about the — day of — 1897, be a verbal lease made  
on said date, at Chickasha, Indian Territory with J. P. Ellis, one of  
the defendants herein — leased, demised and let unto the said Ellis,  
the premises situate, lying and being in the town as shown by the  
Original plat thereof, a copy of which is now in the office of Beavers  
and Sayer in said town, to have and to hold the said premises to the  
said defendant for the term of one month, and from month to  
month thereafter, until terminating at the option of either party, or  
by the failure of the said *lease* to pay rent therefor according to the  
terms thereof, at the monthly rental of five dollars per month,  
250      payable monthly in advance.

That by virtue of said lease said defendant went into the  
possession of said premises, he and those under him paid rent there-

for, and he and those under him still continue to hold and occupy same.

That notwithstanding repeated demands have been made by the plaintiff of the defendants they have refused and neglected to pay rent due upon said premises from the 1st day of April, 1898, according to the terms and conditions of the said lease, but that said defendant- held over and continue in possession of said premises without the permission of said plaintiff and contrary to the terms of said lease.

That at the time of entering into the said lease as aforesaid — was in the peaceable possession of premises and is now entitled to the same.

That plaintiff since the termination of the term for which the premises were demised as aforesaid, did, to-wit; on the second day of July, 1898, make and demand in writing of said defendant- a copy of which is hereto attached as a part of *the* original complaint filed herein and marked exhibit "A" and made a part of this amended complaint, to deliver up and surrender to the plaintiff the possession of said premises. That notwithstanding said notice said defendants have failed and refused and neglected, and still refuse and neglect to  
wuit and deliver up the possession of said premises, contrary  
251 to the form of the *state* made and provided in such cases.

That there is still due the plaintiff as delinquent rents upon the said premises from the defendants the sum of five dollars per month from the 1st day of April, 1898, that the monthly rent-*l* value of said premises is five dollars.

That by Act of Congress passed July 1st, 1898, entitled "An act for the protection of the people of the Indian Territory and for Other Purposes, provision was made for the adjustment of title to town lots in town- in the Indian Territory.

That in order to comply with the provisions of said Act that his right to the said premises may be properly protected, plaintiff desires to place substantial, valuable and permanent improvements thereon.

That unless plaintiff and his agents *is* permitted to enter thereon and thus permanently improve the premises therein, plaintiff will suffer great and irreparable injury, for which there is no adequate remedy at law, and that defendant- in depriving plaintiff of the possession of the aforesaid premises, *pendente lite*, threatens to render the judgment of this court ineffectual.

Wherefore plaintiff prays that the court grant an injunction *instanta-* restraining defendants, their agents, attorneys and servants from in any manner interfering with plaintiff or his agents in the use and occupation of *such* much of the improved part  
252 of said premises as may be necessary *from* him to use in permanently improving said premises.

(Signed)

BEAVERS & SAYER,  
*Attorneys for Plaintiff.*



INDIAN TERRITORY,  
*Southern District:*

Theo. Fitzpatrick being first duly sworn deposes and says that he is the plaintiff in the above styled action, that he has read the above and foregoing amended complaint and that the allegations therein contained are true.

(Signed)

THEO. FITZPATRICK.

Subscribed and sworn to before me on this the 16th day of February, 1899.

C. T. ERWIN,  
*Notary Public.*

"EXHIBIT B"

"In the United States Court for the Southern District of the Indian Territory, at Chickasha, October Term 1900.

THEO. FITZPATRICK, Plaintiff,

vs.

J. P. ELLIS et al., Defendants.

*Answer at Law.*

Now comes J. P. Ellis one of the defendants in the above entitled cause and leave of court first granted, files this his amended answer herein and for such amendment denies;

First. That he has a verbal lease or any other kind of  
253 a lease on or about the — day of — 1897, with the plaintiff,

Theo. Fitzpatrick or at any other time where the plaintiff leased and demised and let to the said defendant J. P. Ellis, the premises.

Second. Defendants denies that he went into the possession of said lot as described in plaintiff's complaint under plaintiff at any time and denies that he now holds possession of said lot under plaintiff in any way.

Third. Defendant denies that there is now due plaintiff any rents or that he owes plaintiff any rents as alleged in said complaint and denies that he holds any continuous possession of said premises unlawfully.

Fourth. That defendant *deny* that plaintiff was ever in peaceable possession of said premises or was ever in possession of the same at any time and denies that plaintiff made a lawful demand on the defendant to *wuit* and give possession of said lot.

Fifth. Defendant denies that he is due plaintiff as delinquent rents or any other money in the sum of fifteen dollars or any other sum.

Sixth. Further answering this defendant states and charges the truth to be; that on the — day of — 1897, one Theo. Fitzpatrick, owned certain improvements situated on the lot described in plaintiff's complaint consisting of a boxed building about twenty four

by forty feet, used and occupied as a butcher shop together with other out buildings, which improvements the said Theo. Barnhart had long time prior thereto erected and placed upon said lot and all improvements thereon.

Seventh. That on or about the said date this defendant arrived from the State of Texas knowing nothing about the land tenure of lots situated in the Indian Territory, except that he had been advised that they belong to the Chickasaw and Choctaw Tribes of Indians. That this defendant had been advised and informed that no person could purchase or own said lots but could only purchase the right of occupancy and the improvements situated thereon, together with the privilege and right of purchasing said lots where they were for sale by the Government of the United States and the Chickasaw Nations.

Eighth. That on or about the 1st day of September, 1897, he purchased all the improvements upon said lot as above described from the said Theo. Barnhart, — represented and led the defendant to believe that by purchasing said improvements he would then have the right and privilege of purchasing said lot when sold as above described, that at the date of said purchase the said Theo. Barnhart nor any other person advised or informed him that the plaintiff or any other person claimed to have any interest in or to said lot or property whatever nor did the defendant have any notice whatever, prior to the purchase of said improvements nor for a long time thereafter ~~that~~ this plaintiff or any one else claimed any interest in or to said property, but on the other hand was lead to believe and did believe that by purchasing all of said improvements he purchased the right to use and occupy said lot and all right- that any person could own in and to said lot, until they were sold by the Government and that then he would have the right and privilege to purchase them.

Ninth. That this defendant is now the legal and lawful owner of valuable, permanent and substantial improvements, situated upon said lot sued for by the plaintiff herein, and is the owner of all improvements situated upon said lot which fact is conceded by plaintiff, and that he has been the owner of all improvements situated upon said lot since he purchased same in the fall of 1897, and that plaintiff has never owned or claimed to own any improvements on said lot whatever and does not now claim to own any of said improvements, situated upon said lot but admits that this defendant is the owner of all of said improvements.

Tenth. That defendant further states that plaintiff is not, and never has been a member of any tribe of Indians, and has never resided in the town of Chickasha, Indian Territory.

Eleventh. That said plaintiff has never at any time had any improvements upon said lot described in said complaint, nor has he at any time ever been in possession of the same.

Wherefore, the defendant prays that he have judgment for the possession of said property, and have all costs of suit in this behalf

expended and for all other relief he may be entitled to either in equity or good conscience.

(Signed)

DAVIDSON & RIDDLE,

*Attorneys for D'fts.*

"EXHIBIT C."

THEO. FITZPATRICK

VS.

J. P. ELLIS et al.

On this the 20th day of October, 1900, this cause came on to be heard. The said parties appeared in person and by attorneys and answered ready for trial, when John Coyle and eleven other jurors, who had been previously sworn, were empaneled to try said cause and having heard the evidence in the case and instructions to the jury the jury retired to consider of this *veridyc* and subsequently returned into court, and being called answered to their names, returned the following verdict:

We, the jury empaneled and sworn to try the above entitled cause find for the plaintiff for the possession of the property, claimed and assess the damages at one hundred and fifty dollars, rental value of said property for two years and a half.

257

J-HN COYLE, *Foreman.*

It is therefore ordered considered and adjudged by the court that the plaintiff Theo. Fitzpatrick do have and recover of and from the plaintiff J. P. Ellis, the premises set out in the plaintiff' —, to-wit; lot three in block 46 in the incorporated town of Chickasha, Indian Territory, together with his costs, and that a writ of possession issue for said property. It is further ordered, considered and adjudged by the court that the plaintiff Theo. Fitzpatrick have and recover of and from the said J. P. Ellis and W. A. Govens and D. H. Butler and Joe Anderson, as sureties the sum of One Hundred and Fifty Dollars damages for which let execution issue.

"EXHIBIT D."

"Know all men by these presents, that we, Theo. Fitzpatrick and Maria Fitzpatrick, husband and wife of Bradley I. T. in consideration of the sum of Five Hundred Dollars to us in hand paid by Mrs. Ella Cross of Chickasha, I. T., the receipt of which is hereby acknowledged, do hereby remise, release and forever quit-claim unto the said Mrs. Ella Cross, all that tract or parcel -f land described as follows, lot 3 in block 46, on Chickasha Ave., in the town of

Chickasha in the Southern District of the Indian Territory.

258 To have and to hold the same the aforegranted premises together with all the privileges and appurtenances thereto belonging to the said Mrs. Ella Cross, her heirs and assigns, to their use and behoof forever.

And we do hereby for ourselves and our heirs, executors and administrators, covenant with the said grantee and her heirs and assigns that the granted premises are free and clear from all incumbrances made or suffered by us, and that we will each for ourselves, our heirs, executors, administrators or assigns forever, defend the same to the said grantee, her heirs and assigns forever, against the lawful claims and demands of all persons by through or under us or either of us.

In witness whereof we have hereunto set our hands this 8th day of April, 1899.

(Signed)

THEO. FITZPATRICK.  
MARIE FITZPATRICK.

In the presence of

C. M. FECHHEIMER.  
Q. A. BOHART.

INDIAN TERRITORY,  
*Southern District:*

On this the 8th day of April, 1899, before me, a Notary Public, within and for the Southern District of the Indian Territory, appeared in person Theo. Fitzpatrick to me personally well known as the person whose name appears upon the above deed of conveyance as one of the parties grantor and states that he had  
259 executed the same for the consideration and purposes therein set forth and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Maria Fitzpatrick wife of the said Theo. Fitzpatrick to me well known to be the person whose name appears on the above deed and in the absence of her husband declared that she had of *own own* free will, signed the relinquishment of dower therein expressly and for the purposes therein contained and set forth without compulsion or under influence of her said husband.

In testimony whereof, I have hereunto set my hand and Notarial Seal at Chickasha, Indian Territory, on the 8th day of April, 1899."

(Signed)

CHAS. H. FECHHEIMER,  
*Notary Public.*

"Know all men by these presents; that we, J. E. Cross and Ella Cross, his wife, for and in consideration of the sum of One dollar, to them paid by R. M. Bourland, do hereby grant and sell and quit-claim unto the said R. M. Bourland, his heirs and assigns forever, the following lands lying in the town of Chickasha, I. T., to-wit; An Undivided one half interest in lot three in block forty six, on Chickasha Avenue in the town of Chickasha, Southern District of the Indian Territory.

To have and to hold unto the said R. M. Bourland, and  
260 unto his heirs and assigns forever, with all appurtenances thereunto belonging.

And I do forever *myself*, my heirs, executors and administrators covenant with the said grantees and his heirs and assigns, that the

granted premises are free clear and discharged of and from all incumbrances made or suffered by *me*, and that *I* will, and *my* heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons claiming by through and under *me*.

And I Ella Cross, wife of the said J. E. Cross, for and in consideration of said sum of money do hereby release and relinquish unto the said R. M. Bourland all my right of dower in and to said lands.

Witness our hands on this the 18th day of September, 1900.

(Signed)

ELLA CROSS AND  
J. E. CROSS.

INDIAN TERRITORY,  
*Southern District:*

Be it remembered that on this day personally came before me the undersigned, a Notary Public, in and for the Southern District of the Indian Territory, duly commissioned and acting, J. E. Cross, to me well known as grantor in the foregoing deed, and stated that he had executed the same for the purposes and consideration therein expressed and set forth.

261 And on the same day voluntarily appeared before me the said Ella Cross, wife of the said J. E. Cross, to me well known, and in the absence of her husband declared that she had of her own free will, signed and sealed the relinquishment of dower in the foregoing deed, for the consideration and purposes therein mentioned and set forth, and without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this the 18th day of September, 1900.

(Signed)

CHAS. M. FECHHEIMER,  
*Notary Public.*

[SEAL.]

My Commission expires Nov. 8th, 1900.

Contestee now offers in evidence the deposition of J. P. Ellis taken in the case of F. E. Riddle and Matt Cook, Plaintiffs vs. W. D. Bell et al., defendants in the U. S. Court, Southern District of the Indian Territory, at Chickasha, and ask that it be made a part of the records.

Contestants object to the introduction of the deposition of J. P. Ellis for the reason the same is incompetent, for the reason said J. P. Ellis, was convicted of the crime of perjury in the United States Court for the Southern District of the Indian Territory at Purcell. We introduce the copies of the records of the court

262 in support of the contention.

COURT: The deposition will be admitted over the objection. If the objection is good, will be sustained.

Copy of the deposition of J. P. Ellis is made a part of the record hereof and is as follows, to-wit:

"In the United States Court for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE & MATT COOK, Plaintiff,

vs.

W. D. BELL et als., Defendants.

*Agreement to Take Depositions.*

It is hereby agreed between plaintiff- and defendants in the above entitled cause that the deposition of J. P. Ellis may be taken in the city of Waxahachie, before any officer authorized to take depositions to be read in evidence in the trial of the above cause in behalf of plaintiff upon direct, cross and redirect interrogatories which shall be prepared at once and we hereby waive any irregularity in transmitting the same to and from the officer taking same and waive the time of taking said deposition and agree that they may be mailed to the Clerk of the United States Court at Chickasha, I. T., by the officer taking the same, as soon as completed.

Both parties hereby reserve any right of objection they may have to the materiality relevancy or competency of said deposition.

Witness our hands this the 8th day of December, 1904.

263 (Signed) BAILEY & VENEABLE & F. E. RIDDLE,

*Attorneys for Plaintiffs.*

(Signed) POTTER, BAREFOOT & CARMICHAEL,

*Attorneys for Defendants.*

In the United States Court Within and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE & MATT COOK, Plaintiffs,

vs.

W. D. BELL et al., Defendants.

The deposition of J. P. Ellis, taken on the 10th day of December, 1904, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon at the office of J. T. Spencer in the City of Waxahachie, State of Texas, to be read in evidence in an action between F. E. Riddle and Matt Cook, Plaintiffs and W. D. Bell, J. E. Cross, Mrs. — Cross and R. M. Bourland et al., defendants, pending in the United States Court for the Southern District, Indian Territory at Chickasha:

J. P. ELLIS being produced to testify in the above entitled case on behalf of plaintiff, after first being duly sworn as required by law, testifies, as follows:

Dir. Int. #1. State your name, age, occupation and present place of Residence.

Dir. Int. #2. State where- or not you ever resided in the City of

Chickasha, I. T., and if so state when you first moved there  
264 and for how long you resided there.

Dir. Int. # 3. State whether or not you are acquainted with the property in controversy in this suit, Lot #3 in block #46, situated in the town of Chickasha, I. T.

Dir. Int. #4. State whether or not you ever owned the possessory right to said lot and improvements situated thereon.

Dir. Int. #5. State from whom you purchased said improvements, if any one, and about what date.

Dir. Int. #6. State about what was the reasonable value of the improvements at the time you purchased the same.

Dir. Int. #7. State whether or not you erected other improvements upon said lot after purchasing the same and if so of what value.

Dir. Int. #8. State who was the owner of all the improvements upon said lot on the 28th day of June, 1898, and who was in possession of said lot at said time.

Dir. Int. #10. If you state that you purchased said improvements from one Theo. Barnhart and the possessory right to said lot, state whether or not he told you at said time he had a right to sell the same and that they belong to him exclusively.

265 Dir. Int. #11. If you state that you were the owner of all the improvements upon said lot on the 28th day of June, 1898, then state about what was the value of said improvements at that time and whether or not any one else owned any improvements situated upon said lot at said time.

Dir. Int. #12. If you state that you were owner of all the improvements upon said lot on the 28th day of June, 1898, then I will ask you to state whether or not said improvements were lasting, substantial and permanent improvements and of what they consisted?

Dir. Int. #13. If you state that you were the owner of said improvements on said date then state for how long afterwards you owned said improvements and to whom you sold the same, if any one.

Dir. Int. 14. State whether or not on or about the — day of June, 1902 you sold all of said improvements to the plaintiffs in this suit.

Dir. Int. 15. I will ask you to state whether or not there has ever been any controversy as to the ownership of the improvements upon said lot from the date you purchased same from Theo. Barnhart until in January, 1903, when the defendants secured possession of said property.

266 Dir. Int. #16. I will ask you to state whether or not Theo. Fitzpatrick or any of the defendants in this cause ever at any time in the litigation over said property or at any time outside of court ever made claim of any kind to any improvements situated upon said lot in controversy until January, 1903.

Dir. Int. #17. I will ask you to state whether or not you were present at the trial of a suit over the possession of said lot in the United States Court at Chickasha, I. T., wherein Theodore Fitz-



patrick was plaintiff and yourself was defendants, being an unlawful detainer suit and if you heard Theodore Fitzpatrick's testimony in that case.

Dir. Int. 18. If you state that you were present and heard his testimony then state whether or not in his testimony given in the trial of that case he made any claim whatever to any of the improvements situated upon said lot.

Dir. Int. 19. State whether or not in your purchasing said improvements and the possessory right from said Theodore Barnhart there was anything in the contract of purchase between you and him which limited your right, or in any way prevented you from selling or disposing of said improvements in any way you saw fit.

Dir. Int. 20. State whether or not when you purchased  
267 said improvements from said Theodore Barnhart, if you believed and understood that by making said purchase it would give you preference right to purchase said lot from the Government when sold and state whether or not you would have purchased same had you not believed it would give you the right to purchase said lot.

Dir. Int. 21. State whether or not you were ever notified by Theodore Fitzpatrick at any time to remove any of said improvements from said lot.

Dir. Int. 22. State whether you know any other facts regarding the controversy in this case.

(Signed) BAILEY & VENABLE & F. E. RIDDLE,  
*Attorneys for Plaintiffs.*

STATE OF TEXAS,  
*County of Ellis:*

I, J. T. Spencer, a notary Public within and for the above named state and county do certify that the foregoing deposition of J. P. Ellis was taken before me and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption the said J. P. Ellis having been first duly sworn by  
268 me that the evidence he should give in the action would be the truth, the whole truth, and nothing but the truth and his statement- were reduced to writing by me in his presence, neither plaintiff being present in person or by attorney.

Given under my hand this 10th day of December, 1904.

(Signed) J. T. SPENCER, N. Public.

In the United States Court for the Southern District of the Indian Territory, at Chickasha, December Term, 1904.

F. E. RIDDLE et al., Plaintiffs,  
vs.

W. D. BELL et al., Defendants.

*Interrogatories Propounded to Witness J. P. Ellis by Potter, Barefoot & Carmichael, Attorney- for Defendants.*

Cross-int. No. 1. If in answer to direct interrogatory No. 2 you state that you ever resided in Chickasha, Indian Territory, please state whether you still reside there or not; if not, when did you cease to make this city your place of residence, and where do you now reside and how long have you resided there.

Cross-int. No. 2. When did you decide to leave Chickasha for Waxahachie, Texas, and what if anything did F. E. Riddle, Esq. say to you about the admissability of your leaving Chickasha so that you would not be present at the trial of this case. State all that was said in this conversation.

269 Cross-int. No. 3. Does your family still reside in Chickasha and is it your intention to return there as soon as court adjourns.

Cross-int. No. 4. Is it not a fact that you plead guilty to perjury on an indictment charging you with that crime in the case of Fitzpatrick vs. Ellis which was tried in the United States Court at Chickasha, and in which the same property was in controversy that is in controversy in this case.

Cross-int. No. 5. Is it not a fact that you are now under suspended sentence during good behavior.

Cross-int. No. 6. Have you ever been pardon-, if yes, please attach your pardon to this deposition and mark the same exhibit A.

Cross-int. No. 7. If in answer to direct interrogatory No. 4, you state that you owned the possessory right to lot #3 in block #46 of the city of Chickasha, please state fully by what right you owner the possessory right to said lot. And state whether or not you ever purchased said lot 3 in block 46 from any one, and if so whom.

Cross-int. No. 8. It is not a fact that the only reason for your claiming the possessory right to said lot is that you claimed the ownership of the improvements on said lot at the time of the passage of the law by Congress known as the Curtis Bill and the lot was never purchased from you by any one.

270 Cross-int. No. 9. If you state in answer to direct interrogatory No. 5, that you purchased the improvements from Teho. Barnhart then state whether prior to that time you bought the improvements, what if any contract existed between Theodore Barnhart, the owner of the lot and Theodore Barnhart the owner of the improvements as to the right of occupancy.

Cross-int. No. 10. If in answer to direct interrogatory No. 8, you

state that you were in possession of the lot in controversy on the 28th day of June 1898, then state by what rights you were in possession of the premises and to whom you were paying rent up to that time for the right to occupy the lot in controversy. Did you have any right title or interest in the lot except as claiming to be the owner of the improvements.

Cross-int. No. 11. If in answer to direct Int. No. 10, you state that Theo. Barnhart told you that he had the right to sell the improvements situated on lot 3 in block 46 then state if it is not a fact that Mr. Barnhart told you the same in conversation that he did not own any right, title or interest in the lot on which these improvements were situated.

Cross-int. No. 12. If in answer to dir. int. no. 13, you state that you sold the improvements to lot #3 in block #46 to F. E. Riddle and Matt Cook the plaintiff- herein then give the date of this transfer, the consideration paid and how it was paid to you.

271 Cross-int. No. 13. Did the plaintiffs F. E. Riddle and Matt Cook but the improvements in the lot in controversy during the former litigation of this lot in which Theo. Fitzpatrick was the plaintiff and you were the defendant. Was it before or after the decision of the Circuit Court of Appeals at St. Louis.

Cross-int. No. 15. Is it not a fact that when you bought the improvements from Theo. Barnhart and went into possession of the house on said lot in controversy that Theodore Barnhart then had a lease with Theodore Fitzpatrick by which Theodore Barnhart was the tenant of the said Theodore Fitzpatrick.

Cross-int. No. 16. Is it not a fact that when you bought these improvements that you became the tenant of Theo. Fitzpatrick and payed him rent, if yes, how many months did you pay him rent before he instituted proceedings to put you out of the possession of the premises.

(Signed) POTTER, BAREFOOT & CARMICHAEL,  
*Attorneys for Defendants.*

Redirect propounded to witness J. P. ELLIS:

Redirect No. 1. State if you did not plead guilty to said charge referred to in cross-int. 4 and 5 under advice of an attorney that there was no valid charge in its indictment and with the  
272 understanding you would not be sentenced and were you in fact ever sentenced. State what became of the case.

Redirect No. 2. State how long you have been contemplating removing to Texas and why or for what purpose.

Redirect No. 3. State if you agreed with any one to come back to the trial of this case if you should be needed and was wired for.

Redirect No. 4. Has the improvements on lot 3, in block 46, ever been in controversy in any way until Jan. 1903, when Mr. Bourland conceived the idea that Judge Clayton gave them to him in his opinion in writ of appeals.

Redirect No. 5. Has not Mr. Fitzpatrick admitted all the time in court and out of court on all occasions where the questions was

raised that you owned the improvements on said lot and also admitted that he had no improvements whatever on same.

(Signed)

BAILEY & VENABLE, &  
F. E. RIDDLE,

*Attorneys for Pl'tfs.*

In the United States Court within and for the Southern District,  
Indian Territory, at Chickasha.

F. E. RIDDLE & MATT COOK

vs.

W. D. BELL et als.

*Answers of the Witness of J. P. Ellis to the Direct Interrogatories  
Propounded to Him in the Above-styled Suit Pending  
273 in said Court.*

1st int. he answers: J. P. Ellis, 60 years of age, None, Waxahachie, Texas.

2nd int. he answers: Yes, I moved there the latter part of Sept. 1897, and resided there until about the first day of December, 1904.

3rd int. he answers: I am.

4th int. he answers: Yes.

5th int. he answers: Theodore Barnhart the latter part of Sept. 1897.

6th int. he answers: About \$15 per month.

7th int. he answers: I erected a side room to said house of the value of \$75.

8th int. he answers: I was the owner of all the improvements in said lot on the 28th day of June, 1898 and was in possession of the same.

10th int. he answers: Theodore Barnhart told me at the time I purchased said property from him that he had the right to sell all of said property and that it belonged to him exclusively.

11th int. he answers: I think the reasonable value of said property on the 28th day of June, 1898, was \$150. No other  
274 person owned any improvements upon said lot at said time.

12th int. he answers: They were substantial lasting and permanent improvements and consisted of one three room house, one story box house.

13th int. he answers: I owned the said improvements until the last of May or the first day of June, 1902, when I sold the same to F. E. Riddle and Matt Cook.

14th int. he answers: I sold said property to F. E. Riddle and Matt Cook some time during the latter part of May or June, 1902, I do not remember the exact date.

15th int. he answers: There has never been any controversy about the ownership of said improvements on said lot during the time I owned said property nor have I heard of any controversy until January, 1903, when defendants secured possession of said lot.

16th int. he answers: They did not.

17th int. he answers: I was present and heard Theodore Fitzpatrick's testimony.

18th int. he answers: He did not make any claim whatever to any improvements upon said lot.

19th int. he answers: There was nothing in the contract of purchase between Theodore Barnhart and myself that in any way limited my right to sell or dispose of said improvements in any way that I might see fit.

20th int. he answers: I understood and believed that when I purchased said improvements from Theodore Barnhart that I would have preference right to purchase said lot from the Government and I further state that I would not have bought said property under any consideration had I not so believed that I had that right.

21st. int. he answers: I was not.

22nd int. he answers: I do not remember any other facts in this case.

F. E. RIDDLE et al., Plaintiff,

vs.

W. D. BELL et als., Defendants.

*Answers to Cross-interrogatories Propounded to J. P. Ellis, Witness, and Answers Thereto.*

1st cross-int. he answers: I do not now reside in Chickasha, I. T. About Dec. 1st, 1904. Waxahachie, Texas, near Dec. 1st, 1904.

2nd cross-int. he answers: I decided to leave Chickasha last summer. F. E. Riddle never at any time advised me to leave so that

I would not be there to testify at the trial of this or any other case, in fact he told me that he wanted me to stay there so that I could be there in person to testify and I told him I had decided to move to Texas and that he could take my depositions or if he or any of the parties to this suit wanted me and would pay me expenses I would come back to Chickasha and testify in person. This is the substance of all the conversation we had about this matter.

3rd cross-int. he answers: My family does not reside in Chickasha but live in Waxahachie, Texas, and it is not my intention to return to Chickasha after court adjourns.

4th cross-int. he answers: I plead guilty to perjury with the understanding that the case would be thrown out of court which was done. Yes it was about the same property in controversy, in this case.

5th cross-int. he answers: It is not a fact.

6th cross int. he answers: I was never sentenced and Judge Townsend had the clerk to erase the case from the docket and I stand just as if I had never been tried, consequently I have no pardon.

7th cross-int. he answers: It is not a fact. The possessory right to said lot was purchased by me from Theodore Barnhart.

9th cross-int. he answers: I have never heard of any contract between Theodore Barnhart and Theodore Fitzpatrick at 277 the time I purchased said property or prior thereto.

10th cross-int. he answers: By purchase from Theodore Barnhart, I was not paying rent to any one, as I supposed at that time. Theodore Fitzpatrick came to my place of business and collected from me \$5. at that time. I thought he was the Indian Collector and was collecting that amount as a permit for me to do business. He came back a second time the second time and collected the sum of \$5. which was a permit for the next year, as I believed. This was sometime after the first collection. He came back a third time and I learned that he was collecting said amount as rent and I refused to pay him any other amount. I had purchased the possessory right from Theodore Barnhart to said lot. My son Will Ellis paid him \$20. while I was sick and I knew nothing about that until after the trial.

11th cross-int. he answers: Mr. Barnhart told me he had the right to sell all of said property and he did not at any time tell me that he did not own any right, title or interest in said lot; if he had I would not have purchased same under any circumstances.

12th cross-int. he answers: The latter part of May or June, 1902. \$750. The same was paid in cash.

278 13th cross-int. he answers: When I went into possession of the said property I did not know anything about a lease between Barnhart and Fitzpatrick. Neither of these parties said anything about a lease to me.

16th cross-int. he answers: When I purchased the said property I did not know I was to become the tenant of Theo. Fitzpatrick. I paid Fitzpatrick the sum of \$5 twice in the manner and for the purposes as stated in my answer to cross-int. No. 10. I never paid him any other sum. My son Will Ellis paid him \$20 while I was sick and I did not know of this fact until after the trial in the detainer suit.

1st redirect int. he answers: Yes, I was advised by my attorney to plead guilty as there was no valid charge in the indictment and with the understanding that I would not be sentenced. I was not sentenced and Judge Townsend instructed the clerk to erase the case from the docket which was done.

2nd redirect int. he answers: I contemplated moving to Texas last summer. My children were all living in Texas except my widowed daughter and she desired to move to Texas. For some time prior to my removal to Texas I was in very bad health and I desired to go to Mineral Wells, Texas that I might recover my health 279 this is the principal reason for my coming to Texas.

3rd redirect int. he answers: Yes, I told Mr. F. E. Riddel that I would come back to Chickasha if I was needed in this case and to wire for me if necessary.

4th redirect int. he answers: The improvements on said lot *was* never in controversy while I owned the property and I never heard of any one claiming said improvements until after the decision of the Court of Appeals in January, 1903.

5th redirect int. he answers: Mr. Fitzpatrick never at any time claimed the improvements on said lot, and all admitted upon all occasions in and out of court that he never owned said improvements and that he did not have any improvements of any kind upon said lot.

(Signed)

J. P. ELLIS.

Sworn and subscribed to before me this 10th day of December, 1904.

J. T. SPENCER,  
*Notary Public in and for Ellis Co., Texas.*

J. W. SPEAKE being re-called testified as follows:

By RIDDLE:

Q. Mr. Speake, I will ask you to state whether or not there is a case on the docket of your court No. 762 styled F. E. Riddle and Matt Cook vs. W. D. Bell et al. and Bourland and Cross, defendants, an ejectment suit over Lot 3 in block 46, in this town.

A. Yes sir.

Q. State whether or not the deposition you hold in your hand of J. P. Ellis is among the files in that case in your office.

Q. Yes sir.

Q. Received and filed.

A. Yes sir.

By FECHHEIMER:

Q. It is your custom to put a file mark on papers filed?

A. Yes sir.

Q. There is a file mark on this deposition?

A. No sir.

Q. You cannot swear positively that this is the original deposition?

A. No sir.

Objected to for the reason that it cannot be identified.

By ALLEN:

Q. You don't know whether that is the original deposition or not?

A. I could not say.

Q. Don't know whether this is a part of the court records or not?

A. No sir.

The objection is sustained.

281 F. E. RIDDLE being first duly sworn testified as follows on behalf of respondents:

By LEDBETTER:

Q. Mr. Riddle were you plaintiff in the case of F. E. Riddle vs. Bell, No. 762.

A. Yes sir.



Q. Do you know whether or not the papers purporting to be the deposition of J. P. Ellis is the original deposition taken in that case.

A. Yes sir it is the original deposition.

Q. Do you know the signatures of the attorneys who signed the agreement to take the deposition?

A. Yes sir.

Q. Whose signatures do they purpose to be?

A. Potter, Barefoot & Carmichael, I think it was signed in my presence, but I am not sure.

Q. Who signed for the plaintiff?

A. I think I did.

Q. Were these deposition- used in the trial of this case?

A. They were used in a similar case by agreement.

Q. Do you know where these deposition- have been?

A. They have been among the files with the papers in the case all the time, were with the papers this morning. They were with the other papers in the Clerk's office in a case involving the rents over this same lot, wherein the depositions were used by agreement 282 with Barefoot & Carmichael. I will state further that my recollection is that I came to the Clerk's office and had Mr. Scoffern to open the deposition in my presence and he made that notation on the envelope in my presence. "Filed and opened December 11, 1904, 4 P. M. at the request of Attorney for Plaintiff." I am sure that is the envelope they came in and it has been among the files of the papers since it was opened by Mr. Scoffern.

Cross-examination by FECHHEIMER:

Q. Mr. J. P. Ellis, whose deposition you are seeking to introduce in this case is the same J. P. Ellis that was defendant in the suit of Fitzpatrick vs. Ellis and the same J. P. Ellis who was indicted for perjury in the same case in reference to the lot?

A. Yes sir.

Q. The testimony he was indicted under for perjury was the testimony he gave in the case of Fitzpatrick against Ellis in the United States Court for the Southern District of the Indian Territory, and the same J. P. Ellis.

A. The same Ellis, but not the same testimony. I will say further that I advised Mr. Ellis there was no crime of perjury charged in the indictment and advised him to plead guilty under the court's instruction that he would not be sentenced, and the record shows that he was not.

283 R. M. BOURLAND, being first duly sworn testified as follows on behalf of contestants:

By FECHHEIMER:

Q. State your name and residence?

A. R. M. Bourland, my home is in Montague County, Texas.

Q. Do you know anything about lot 3, block 46, in Chickasha,

I. T.?

A. Yes sir.

Q. Who owned the improvements thereon in February and March, 1902?

A. Myself and Mrs. Cross.

Q. What did you do with that lot?

A. Sold it to Mr. H. B. Johnson.

Q. What did the improvements on that lot consist of?

A. There was a little box house and shed room to it.

Q. Was there anything else on it in 1903?

A. There was a stone wall on it, part of that come over on the line.

Q. Was that stone wall built under an agreement between you and Mr. Johnson on this lot?

A. That stone wall was put there by an agreement between Mr. Riddle, Mr. Johnson, myself and Mrs. Cross.

Q. Was there an agreement in writing?

A. Yes sir.

Q. Have you that contract?

A. No sir.

284 Q. Do you know what became of it?

A. No sir.

Q. Do you know where it is at present?

A. No sir.

Q. When did you last see it?

A. I don't think I have ever seen it since I signed it.

Q. It was no- delivered to you?

A. No, sir, I think Mr. Johnson kept it.

Q. Do you mean to say that you have not had it is your possession?

A. No sir, I have no recollection of it.

Q. You don't know where it is at present?

A. No sir.

Q. Was that contract made in 1901?

A. I do not remember.

Q. It was prior to the time the townsite commission was here?

A. Yes sir.

Q. I believe you said you sold to Mr. Johnson.

A. Yes sir.

Q. You sold it after it was appraised?

A. After it was appraised, that is the way I remember it, yes, I know it was?

Q. Was you in possession of that lot when you sold it to Mr. Johnson and the improvements thereon?

A. Yes sir. Me and Mrs. Cross.

285 Q. Who put you in possession of the lot and improvements?

A. Judge Beavers and Mr. Sayer were the attorneys and they had me put in possession of it by the U. S. Marshal Mr. Madsen.

Q. Did you collect any rents from the premises?

A. Yes sir I did.

Contestees object for the reason it is incompetent, and ask that it be stricken from the record.

COURT: It may be stricken.

Q. Who owned those improvements on the 8th day of Feb. 1902?

A. Mrs. Cross and myself, we were put in to possession by the officers.

Q. You were not put in possession on that day?

A. I don't remember, it was sometime in January, but I do not know what year.

Q. Before the townsite commission was here?

A. I declare I can't remember.

Cross-examination by Mr. LEDBETTER:

Q. Mr. Bourland you base your claim or rather your statement that you and Mrs. Cross were the owners of the improvements on that judgment?

A. Yes sir.

Q. Bot on nothing else?

A. I base my claim on having bought the lot and being put in possession by the officers of the court after the suit was disposed of by the courts.

286 Q. You bought the place from Mr. Fitzpatrick?

A. No sir.

Q. From whom?

A. I bought half of it from Mr. Cross. Me and him made the trade, but it was in his wife's name.

Q. They bought from Fitzpatrick?

A. Yes sir.

LEDBETTER: We move to exclude the testimony of the witness Bourland in reference to the ownership of the improvements on that lot and in reference to the contract between him and Mr. Johnson for the reason that they have not made proper predicate for the introduction of secondary evidence. The testimony of Mr. Johnson is that he turned the contract over to Mr. Bourland; the testimony of Mr. Bourland shows he thinks he turned it over to Mr. Johnson, which clearly is not sufficient accounting for the absence of the contract.

COURT: That part of the witness's testimony relative to the contract may be stricken out.

Redirect examination by FECHHEIMER:

Q. Where do you keep your papers, where that contract is liable to be if you have it?

A. I have them over here in the safe in the Brokerage office?

Q. If it was here it would be there.

A. Yes sir.

287 Q. You keep some of your papers in Texas?

A. I think so.

Witness excused to search for contract.

H. B. JOHNSON, being recalled testified as follows on behalf of contestants:

By FECHHEIMER:

Q. Did you ever look among your papers for a copy of that contract?

A. Yes sir.

Q. When did you look?

A. The last term of court I think.

Q. At whose request did you look?

A. Mr. Potter's.

Q. Please state while you are on the stand whether you ever employed Potter, Barefoot & Carmichael to represent you in any action pending in this court in reference to this lot.

A. They were employed by Bourland & Cross.

Q. They were not in your employ?

A. No sir.

Cross-examination by Mr. LEDBETTER:

Q. Mr. Johnson; Potter, Barefoot & Carmichael represents your interests in the law suit don't they?

A. They took care of the case.

288 Q. And your ownership of that place in involved in that suit. The suit was brought before you became interested?

A. Yes, sir.

Q. Since you became interested in that suit, Potter, Barefoot & Carmichael, have represented the interests that you bought in that suit?

A. Yes sir.

Q. That was the understanding that *he* was to continue to represent the suit at the time you bought it?

A. Yes sir, they were to complete the proceedings they had started.

Q. You bought the place knowing the suit was pending?

A. At the time I bought the lot I thought it was settled; the judgment was final.

Q. If you thought the matter settled how was it that you understood that they were to continue to represent the interests you bought out?

A. Judge Potter came to me after I had bought the lot at the next term of court, and said that Riddle had got back into court for some reason and brought up another trial on this lot.

A. Did you not state that you had an understanding with Bourland at the time you bought that Potter, Barefoot and Carmichael were to continue—

A. No understanding whatever.

289 Q. You never paid him a fee?

A. No sir, he ask- me how I came to get into Court.

Redirect examination by FECHHEIMER:

Q. Do you know where any of the copies of that contract are?

A. No sir.

Q. You say you searched your papers for a copy?

A. We never had a copy.

Q. Mr. Johnson do you know what the contents of that contract were?

LEDBETTER: Objected to for the reason there has not been sufficient predicate laid for the introduction of secondary evidence.

Objection sustained.

Q. Have you that contract?

A. No sir.

Q. Is it in your possession?

A. No sir.

Q. Is it among your papers?

A. I have not been able to find it.

Q. Has it come into your possession since the last term of court?

A. No sir.

290 F. E. RIDDLE being recalled testified as follows:

By FECHHEIMER:

Q. Mr. Riddle have you a copy of that contract?

A. I don't think I have.

Q. Did you have a copy of it?

A. I think not, I would like to see a copy of it, the first I knew of it was the answer of Bourland and Cross and I looked among my papers but have not found it.

R. M. BOURLAND being recalled testified as follows:

By FECHHEIMER:

Q. Did you make a search for that contract among your papers?

A. Yes sir.

Q. Among the papers where you keep your papers?

A. Yes sir, I could not find it.

Q. Have you any other papers concerning your property here?

A. No sir.

Cross-examination by Mr. LEDBETTER:

Q. You say you have a lot of papers at home in Texas?

A. Nothing pertaining to any property up here.

Q. Did you ever have any of your papers in your pocket down there?

A. Nothing like that I have letters and notes.

Q. You are in business in Texas, are you not?

A. No sir.

Q. You have a home down there?

291 A. Yes sir.

Q. Where your family lives?

A. Ye- sir.

Q. Have you some of your business papers in Texas.

A. I have some deeds for property down there.

Q. Any conveyances, cattle contracts,——?

A. Yes sir, probably ten years old laid away.

By ALLEN:

Q. Who signed this contract?

A. Myself, Mrs. Cross, H. B. Johnson, I believe, and I don't remember whether Ellis or Riddle signed it as attorney from Mr. Ellis at that time, but he is the man who entered into this agreement with us.

Q. Where was this agreement signed, whereabouts in town?

A. My recollection is that it was signed in the First National Bank.

Q. Who was the custodian of this contract?

A. Mr. Johnson.

Q. Did you ever see the contract after you signed it?

A. No sir, I have no recollection of ever seeing it after I signed it.

Q. Do you know whether or not Mrs. Cross has that contract, do you?

A. No sir, I do not know.

Q. She was a party to this contract?

A. Yes sir, but at that time her husband was living and he attended to the business.

292 Q. Did he signed it or did she signed it?

A. I do not remember.

Redirect examination by FECHHEIMER:

Q. Do you know what that contract was about?

A. Yes sir.

Q. Do you know what that contract was?

A. I remember the substance of it.

Q. To the best of your recollection what was the substance of the contract?

LEDBETTER: Objected to for the reason it is shown that there were two other parties to the contract, and it is not proven that they have not possession.

No ruling.

F. E. RIDDLE recalled testified as follows:

By FECHHEIMER:

Q. Mr. Riddle did you have a copy of this contract at the last term of court?

A. No sir.

Q. Have you had a copy of this contract?

A. I do not remember of ever having a copy. I remember a contract that was entered into between Mr. Ellis and Mr. Johnson, I don't remember Bourland and Cross being a party to the contract, but they may have signed it afterwards. I know the contract Mr. Ellis signed did not have the terms in it they say.

*Agreement.*

It is agreed by the parties hereto that the contestants E. B. & H. B. Johnson be given ten days in which to produce the original contract between Ellis, Johnson, Bourland and Cross in reference to the wall on the line between lots two and three in block 46 in the city of Chickasha, I. T., and either party may have the right to introduce the contract within that time.

F. E. RIDDLE being duly sworn, testified as follows on behalf of the contestees:

By LEDBETTER:

Q. Do you know J. P. Ellis?

A. Yes sir.

Q. Were you ever his attorney?

A. Yes sir.

Q. When did you first become his attorney in connection with the lot in controversy?

A. I think the firm of Davison and Riddle were his attorneys in July, 1898 in reference to the unlawful detainer suit over the lot in controversy.

Q. You have been connected with the litigation growing out of this lot ever since?

A. Yes sir.

294 Q. Mr. Riddle, you represented Mr. Ellis at the time the lot was schedule-?

A. No sir, I was representing myself and cook at the time it was schedule-.

Q. Did he convey the improvements on the lot to you?

A. Yes sir.

Q. By any instruments in writing?

A. Yes sir.

Q. Have you that instrument?

A. Yes sir.

Q. Were you present when this conveyance was signed?

A. Yes sir.

Q. Did you see Mr. Ellis sign it?

A. Yes, sir.

LEDBETTER: We offer in evidence conveyance from J. P. Ellis to F. E. Riddle and Matt Cook, dated March 26th, 1902.

FECHHEIMER: Objected to for the reason it impeaches the witness for contestees.

COURT: The objection is overruled.

Q. Mr. Riddle, how long after the date of that conveyance was it before the lot was appraised?

A. It was either the afternoon or the next day after the conveyance was executed that we had the lot schedule- but I would not be positive about the day.



295 Q. Did you present that conveyance to the townsite commissioners at the time — the appraisal of the lot?

A. Yes sir I did to the Clerk in charge.

Q. You heard Mr. Bradford's testimony in reference to the endorsement on some records that this lot was in litigation. State what occurred in reference to that?

A. Well, after I heard the townsite board or the clerks were scheduling the lots I went up to the office where they were and Mr. Bradford, my recollection is, was alone in there at the time, and I introduced myself to him and he likewise, and I asked him if any action had been taken to the best of my recollection to lot 3 in block 46, and he told me in substance,—I don't know whether he called Mr. Sayer's name or not,—any way the other parties, for Bourland and Cross had come up there and stated that the lot was in litigation. I talked the matter over with him and told him that there was an unlawful detainer suit pending over the lot, but that the improvements had never been in litigation, in fact that there had been no controversy over the ownership of the improvements and it had been conceded all along that Mr. Ellis absolutely owned all the improvements upon the lot. He told me at the time that neither Mr. Hefley nor Mr. Burney were here but would be over in a few days, and I think I ask him what action would be taken in a case of that kind where simply the grounds were in  
296 litigation, but no controversy over the improvements, and my recollection is that he told me that he did not know what the commissioners would do, but he rather thought if there was no controversy over the improvements they would disregard the fact that the possession of the lot was in controversy and schedule to the man who owned the improvements. He states further that he had made a notation that the lot was in litigation, temporarily until the Chairman of the Townsite Commission would come over, and did not know what final action would be taken but that if there was no controversy over the improvements that it would be scheduled to the party who owned the improvements.

Q. You presented your bill of sale to the Commissioner?

A. When I heard Mr. Hefley was in town I went up to see him and asked him where there was a controversy over the possession of the lot, but no controversy over the improvements, what the rules of the Commission was in such cases. He said if there was no controversy over the improvements it would be scheduled to the party that owned them. My recollection is that he stated in substance that the land belonged to the Chickasaw and Choctaw Nations and they would not regard that, but simply the owned — the improvements, and after this conversation with Mr. Hefley, Mr. Cook and I went to Mr. Ellis and bought the improvements and next day went before the Commission and certified that we were the owners of the improvements and exhibited our bill of sale and had the lot  
297 scheduled to us.

Q. Did you ever see any records of the Commission about the lot being in litigation?

A. No sir, I have no recollection of seeing any record in reference to the lot at all.

Q. Do you know when that notation or endorsement was removed?

A. No sir.

Q. Did you have anything to do with the removal of it?

A. I did not. All I know is we took the bill of sale up there and made out the required form of application for schedule and certified that we were the absolute owners of the improvements.

A. At that time was there in fact any dispute about the ownership of the improvements?

A. No sir, there was not. In fact there was never any controversy over the ownership of the improvements.

Q. You and Mr. Cook paid the price for the lot?

A. Yes sir.

Q. It was schedule- to you?

A. Yes sir, and notice served upon us a few days after that we appeared before the Commission and signed up, and then shortly after that sent the full amount in to the Indian Agent and got a receipt for the full amount.

Q. After the lot was schedule- and appraised to you did  
298 you make any written contract with Mr. Johnson in reference to the lot?

A. No sir, I made a verbal contract or agreement. There was a written contract between Johnson and Ellis.

Q. Have you that contract with you?

A. Yes sir.

LEDBETTER: We offer in evidence the contract between Johnson & Ellis.

FECHHEIMER: We object to the introduction in evidence of the contract for the reason it does not effect the title to the improvements on this lot in any way, shape or form, and that the judgment of the court precludes him from setting up such a contract and for the further reason that the court has already decided the right of *these* assignments was in Bourland and Cross or Fitzpatrick and his assigns.

COURT: It may be admitted. Excepted.

Q. That is Mr. Johnson- signature?

A. Yes sir.

Q. Did you ever make any verbal agreement with Mr. Johnson?

A. Yes sir, while Mr. Johnson was erecting the building or probably after the erection of the building on the lot on the east side, where Bryan Dry Goods Store is, I made a verbal agreement with him, we did not reduce it right down to details but we entered  
299 into an agreement and understanding that he would furnish the money to put a brick building upon this lot.

Q. Was it when the Townsite Commission was here?

A. I do not remember.

Q. Was it prior to the time the written contract you just introduced?

A. I do not remember.

Q. The contract was not carried out?

A. I do not know, he did not carry out his part of it.

Q. Was it before or after you bought it from Ellis?

A. After I bought from Ellis. We just had an agreement or understanding that he was to put up a building and I was to let him have a half interest in the lot and he had his architect in Ft. Worth to draw plans for the building which I now hold in my hands.

FECHHEIMER: Objected to unless he can fix the date as before the lots were schedule- or after the lots were schedule-.

Q. What was the date of this agreement?

A. I don't remember the date, but about the time he was building those other buildings.

Q. Whp paid for the plans?

A. I don't know he said he would have them drawn and did have them drawn.

Q. He gave those plans and specifications to you?

A. Yes sir.

300 Q. When was that?

A. I do not remember the date.

Cross-examination by FECHHEIMER:

Q. Mr. Riddle is it not a fact that those buildings that are on those lots now were built before the Townsite Commission was here?

A. The first National Bank Building was, yes sir.

Q. Both of those on lot one and two, and this part of wall was built before the Townsite Commission was here?

A. Yes sir, I think so but that was not this building.

Q. This was a long while after the schedule was made?

A. I think a short while but I do not know the date.

LEDBETTER: Object to the testimony regarding the building for the reason that it was after the time the Townsite Commission was here and schedule- the property, and for the further reason Johnson did not own the property at the time but that it was the property of Bourland and Cross and was so decreed by the court.

COURT: The objection is sustained.

Redirect examination by LEDBETTER:

Q. Mr. Riddle did you have anything to do with the deal between Mr. Ellis and Mr. Barnhart at the time the transfer was made from Barnhart to Mr. Ellis?

A. Yes sir.

Q. State what you had to do with it.

301 Contestants object for the reason it is incompetent, irrelevant and immaterial, it not having been shown that the town lots were schedule-.

No ruling.

Q. State if there is anything further you want to say?

A. I don't believe I was asked whether or not Mr. Cook and I owned the improvements at the time it was schedule-

Q. Was that a fact?

A. We owned the improvements at that time and no one else claimed any interest in them at that time that I ever heard of. The improvements consisted, I think of a three room house. I am under the impression it was a box house, anyway it was a frame or a wood house and I think it had three rooms, a portion of it, the East portion I think, was used as a Millinery store and I think at that time the West Portion was used as a confectionery store and restaurant and I think at that time was renting for \$35.50 per month. That is my best recollection now.

By ALLEN:

Q. Who collected the rents on these buildings?

A. Mr. Ellis was collecting up to the time he sold us, and then we collected after that through him and allowed him to apply it on an indebtedness we owed him at the time.

Cross-examination by FECHHEIMER:

Q. Mr. Riddle was there not a half of a brick wall on that property at the time you claimed to have bought it?

A. I think so, yes, Mr. Johnson agreed to let me have *have* interest in it.

302 Q. What date did you say you bought from Ellis?

A. The latter part of March, two days before the schedule.

Q. Have you had that in your possession all the time since it was made?

A. Yes sir.

Q. Have you paid Mr. Ellis any money on that.

A. Yes sir paid him some then and the balance since then.

Q. Was you attorney for Mr. Ellis from July 7, 1898 in this litigation through the U. S. Circuit Court of Appeals?

A. Yes sir.

Q. You know then when the judgment was rendered in this case, do you not?

A. Yes sir I was present.

Q. Was that in October, 1900.

A. I think it was.

Q. That was prior to the time the townsite limits were segregated?

A. Yes sir.

A. It was prior to the time the townsite commission was appointed?

A. Yes sir.

Q. Then is it not a fact that the opinion of the Court of Appeals for the Indian Territory was rendered prior to the time the Townsite Commission came here?

A. I am not sure but I rather think it was.

Q. You had knowledge of both of these judgments?

303 A. Yes sir.

Q. Both judgments were rendered prior to the time the townsite commission came here.

A. I am not sure but I think it was.

Q. You had knowledge of both of these judgments.

A. Yes sir.

Q. It is not a fact that Mr. Ellis held possession of these lots under a bond?

A. I think so.

Q. Did he not give a bond at the time these suits were instituted?

A. I think so, the bond will show for itself. He gave a super-sedeas bond.

Q. Is it not a fact that he gave a bond for the premises?

A. I think he did.

Q. *Is it not a fact that he gave a bond for the premises?*

A. *I think he did.*

Q. Is it not a fact that at the time the townsite Commission was here that Ellis was holding possession of this property — virtue of giving super-sedeas bond.

A. Yes sir.

Q. And that the plaintiffs could not get possession for the purpose of improving or for any other purpose until the appeal was decided in the Circuit Court of Appeals?

A. The lot was already improved when the Curtis Act  
304 *when* into effect. All the improvements were on the lot in 1898 when the Curtis Act passed it was already improved.

Q. Is it not a fact and don't you know that the Curtis Bill did not go into effect until after the townsite limits were designated by the commission?

A. I don't know when the townsite limits were designated.

Q. Didn't you know at the time you made this purchase or this pretended purchase from Ellis that the court here had rendered judgment for the possession of these premises?

A. Rendered judgment in the unlawful detainer suit.

Q. And that the Court of Appeals of the Indian Territory had affirmed the judgment and expressly stated that the improvements went with the lot?

A. I did not understand so. I thought it was an obiter dictum statement by the judge.

Q. Did you make an effort as attorney for Ellis in the Circuit Court of Appeals, to have these improvements awarded to Ellis?

LEDBETTER: Objected to for the reason that it is not proper cross-examination and the record will be the best evidence?

COURT: The objection is sustained.

Q. Mr. Riddle, at the time you made out these questions in this deposition of Mr. Ellis, did you have possession of the Bill of Sale.

A. I think I did, yes sir.

305 Q. What is the date mentioned in the Bill of Sale?

A. I don't know some time in March, 1902, I do not remember the exact date.

Q. When did Mr. Ellis sign that Bill of Sale?

A. The date it bears the date.

Q. You had the deposition of Mr. Ellis taken, didn't you?

A. Yes sir.

Q. Did you write Mr. Ellis at the time what his answers should be to certain questions?

A. No sir, I don't think I wrote to Mr. Ellis but one letter and I think that is attached to his answers.

Q. Did you write him how he ought to answer these questions?

A. No sir.

Q. Did you believe Mr. Ellis' answers to the questions were true?

LEDBETTER: Objected to as incompetent, irrelevant and immaterial.

COURT: The objection is sustained.

Q. Mr. Riddle, Ellis in his deposition states that he owed the improvements until the last of May or 1st of June, 1902 when he sold them to F. E. Riddle and Matt Cook how about that?

A. I do not know, I know the bill of sale was dated the latter part of May of the first day of June.

306 Q. He stated that he owned the improvements until the latter part of May, or first day of June when he sold them to F. E. Riddle and Matt Cook.

A. I supposed he stated the bill of sale was dated about that time, but we had the bill of sale before the Commission when they were scheduling to us.

By LEDBETTER:

Q. Was it acknowledged before a notary on that date?

A. It was acknowledged on the day it appears to have been acknowledged, I think it was the same day.

By FECHHEIMER:

Q. Mr. Riddle you got up those interrogatories didn't you?

A. Yes sir.

Q. In direct interrogatory No. 1e you say, "if you state you were the owner of said improvements, then state how long have you owned the improvements and if you sold them to any one" you propounded that interrogatory did you not?

A. Yes sir.

Q. Mr. Ellis, said; "I owned said improvements until the last part of May, or June, 1902, when I sold them to F. E. Riddle and Matt Cook.

A. Yes, I think so.

Q. Interrogatory No. 14; state whether or not on the — day of June, 1902 you sold the improvements to the plaintiffs in this suit.

Did you propound that interrogatory?

307 A. I guess so unless it is a cross interrogatory.

Q. If you had possession of this instrument all this time why did you propound that interrogatory and put in that date as June?

A. I will just state to you that I had not looked at the Bill of Sale for more than a year or more when I propounded those interrogatories and I had a receipt or notice that was served on me and Mr. Cook which was dated the 12th day of June, and I was laboring under the impression at that time that the lot was schedule. I did not refer to the Bill of Sale, but after looking at the Bill of Sale and referring to the other papers I discovered that the lot was schedule in March but no notice was served until the 12th day of June, 1902.

Q. You did not make any effort to correct the deposition?

A. I don't think I noticed it until the last term of Court and considered it immaterial as the bill of sale was signed the day it appeared to have been and it was signed a day or two before the lot was schedule to us, of this I am sure.

Q. Did you verify the complaint in case No. 762?

A. Yes sir.

Q. I believe in that you allege that on the 28th day of June, 1898 and for several weeks prior and ever since that date you were the legal and absolute owners of that property?

A. Yes sir, the improvements.

308 Q. You testified to that?

A. Yes, sir, we were.

Q. Mr. Riddle you had possession of the lot and improvements therein at the time Mr. Johnson purchased it?

A. I do not know, the writ shows it to have been delivered to M. M. Beavers.

Q. Who was M. M. Beavers?

A. He was a lawyer practicing in Chickasha.

Q. Don't you know who he represented in that suit?

A. I think he and Sayer represented Theo. Fitzpatrick.

Q. Didn't he represent Bourland and Cross?

A. I think they in connection with Potter, Barefoot & Carmichael represented Bourland and Cross.

Q. And at the time you made this purchase from Ellis and all the time before that time you knew that the case had been decided in favor of the plaintiffs for possession of that property?

A. Yes, sir, I knew that the unlawful detainer suit had been decided.

Q. Who was it that changed that schedule from being in litigation to Riddle and Cook?

A. I don't know anything about it except that Mr. Bradfor- told me that the notation was made there before the Commission came over, in order to call their attention to it and that it was in litigation.

309 Q. Do you know who scheduled it to Riddle and Cook?

A. Yes sir.

Q. Who?

A. Mr. Kelsey.

Q. Was Mr. Bradfor- there?

A. I am not sure, my recollection is that he was there.

Q. Did you see him schedule it to Riddle & Cook?



A. Who?

Q. Mr. Kelsey.

A. Yes sir I saw him.

Q. Did you see him erase the words "in litigation."

A. No sir, he made out the application to Mr. Cook and myself and we signed it at the same time I signed up for my residence lots.

Q. The same day you signed up for your residence lots?

A. I am not sure but I think it was.

Q. What day was it the lots were scheduled to Riddle and Cook?

A. I don't remember the date, the latter part of March, the same day or the next day after we took the Bill of Sale for the improvements.

Q. Do you know anything about the contract that was entered into between Mr. Johnson and Mr. Bourland and Mr. Ellis in regard to a party wall on that lot?

A. I remember a contract entered into by Mr. Johnson and Ellis.

310 Q. In reference to the wall.

A. Mr. Johnson agreed to let us have a half interest in it. Q. Did you pay Mr. Johnson for that one half wall on that lot, or offer to pay him for it?

A. No sir, I have not offered to pay him for it yet. The time has not arrived.

Q. Do you know whether Mr. Ellis offered to pay him or did pay him?

A. I do not know.

Q. That wall was there prior to the scheduling of this lot?

A. I think it was that is my recollection.

Q. And the litigation in reference to this lot had been decided in the Federal Court here and the Court of Appeals, South McAlester prior to that time?

A. I think so.

Redirect examination by LEDBETTER:

Q. You say you had a contract with Johnson and Ellis in regard to the wall?

A. Yes sir, I think perhaps I wrote a contract, but I have no recollection of Mr. Bourland signing it, and don't believe he did sign it in my presence. I was under the impression it was a contract, it was a contract between Mr. Johnson and Mr. Ellis solely. I would like to see that contract.

311 Redirect examination by FECHHEIMER:

Q. What litigation was pending, if any, at the time, this wall was built over this lot?

A. I think the unlawful detainer suit was pending.

Q. The litigation between Fitzpatrick and Ellis?

A. I think so.

Q. In the Circuit Court of Appeals at St. Louis, was it not?

A. I think it had been prosecuted to that court.

Redirect examination by LEDBETTER:

Q. Mr. Ellis owned these improvements long before this agreement was made?

A. Yes sir, he owned the improvements long since 1897, I think until he sold them to us in March.

Recross-examinaion by FECHHEIMER:

Q. That is your conclusion.

A. No sir, it is a fact.

Q. You say that Ellis owned these improvements, not is it not a fact that Mr. Elis forfeited his right to the improvements by taking them off?

A. No sir, he had not.

Redirect examination by LEDBETTER:

Q. Mr. Riddle, Mr. Fechheimer asked you several questions or the same questions several times, whether or not you purchased the improvements on the lot knowing the litigation was pending.

I will ask you if it is not a fact that throughout all the litigation and controversy, the improvements on the lot was not in question?

FECHHEIMER: Objected to for the reason the record is the best evidence.

COURT: Objection is sustained.

J. B. KELSEY being first duly sworn, testifies as follows:

By LEDBETTER:

Q. Mr. Kelsey are you acquainted with lot 3, Block 46 in the town of Chickasha, I. T.?

A. Yes sir.

Q. When did you first become acquainted with that lot?

A. In February, 1902.

Q. Were you acting in an official capacity at that time?

A. Yes sir.

Q. Did you know Roy Bradford at that time?

A. The first time I saw him he came to the office from Ardmore when he came here to assist me in making schedules.

Q. You were representing the Commission in scheduling property.

A. Yes sir, appointed by the Indian Inspector at Muskogee to make the schedule here. He stated that in a letter to me Mr. Hetley would soon be here to give me instructions and that a young man by the name of Bradford would be here from Ardmore to assist me.

Q. How long were you here working in that line?

A. I made a preliminary schedule and it took me eighteen days; that was prior to the time the final schedule was made.

Q. Do you remember the occasion of scheduling lot 3, block 46?

A. Yes sir, I scheduled it.

Q. Was there any evidence as to the ownership of the improvements presented to you at that time?

A. Yes sir, the parties brought a Bill of Sale and showed it to me and then certified that they owned the improvements, and I had nothing more to do than to schedule it to them.

Q. Do you remember any record showing the lot in litigation?

A. Prior to that—I don't remember whether Mr. Bradford was in the office or not, but prior to that time I saw opposite that lot the words "In litigation" and since listening to this testimony today my recollection is that I called Mr. Bradford's attention to that, but I am not certain, but I think I called his attention to that and asked him what that meant and he stated that some parties came up and stated that it was in litigation. I ask- him, if it was the improvements and he said no, it was the lot. I said that our instructions was to schedule the lots to the owners of the  
314 improvements and that we could not pay any attention to the lot and did not care anything about that. A day or two after that Mr. Bradford left, I think his father died, and I finished the work.

Q. What became of that record?

A. I erased it. I examined the papers after Mr. Bradford left. He did a good deal of work. I could not find any contest filed, no papers showing that the lot was in litigation and I had nothing to do except schedule it to the first one that appeared that would certify that they owned the improvements.

Q. Did you have any conversation with Mr. Riddle at the time of erasing it?

A. I don't think I did. I think I erased it on my own motion, for the reason that my instructions were to schedule to the owner of the improvements.

Cross-examination by FECHHEIMER:

Q. Mr. Kelsey you say you were the clerk in charge and not Mr. Bradford?

A. I have my letter at the house instructing me to make the schedule of the city of Chickasha, and that a young man by the name of Branfor- from Ardmore would come here to assist me.

Q. Didn't you tell Mr. Bourland in a conversation with  
315 — when he ask- you if that lot was in litigation, didn't you tell him that you had listed it "in litigation?"

A. No sir.

Q. You never did?

A. No sir.

Q. Did Mr. Bourland ever come to you and ask you how that lot was listed?

A. I don't think he ever did, in fact I knew nothing until after that he had any interest.

Q. Were not your instructions where there was any controversy to mark them in litigation?

A. No sir, not unless some one made claim to the improvements.

Q. You were the Judge and not the Commission?

A. I worked under the direction of the Townsite Commission.

A. No sir, the improvements were not in litigation.

A. There were only one to two lots wherein the improvements were in litigation.

Q. Is this not the only one you determined?

A. No sir, the improvements were not in litigations.

Q. Is it not a fact that you were instructed when property was in litigation to mark it so?

A. Not unless the papers were filed claiming the improvements.

Q. Mr. Kelsey, I will ask you when you were getting up  
316 the schedule in this town, didn't you in the presence of  
Henry Johnson in the First National Bank, schedule lot 1  
to Mr. Johnson, lot 2 to the other Johnson, and lot 3 in litigation?

A. No sir, I did not.

Q. You never asked him about that?

A. I do not recollect, I scheduled lots 1 and 2 to these parties.

Q. You never asked him about that?

A. I don't recollect that I did.

Q. You knew the property was in litigation, in was common report?

A. No sir, I did not know that particular lot was in litigation, I knew a certain lot was in litigation.

Q. You knew it was marked in litigation?

A. Yes sir, I saw it and rubbed it out.

Q. Did you know who was claiming it besides Riddle and Cook?

A. No sir, I did not know what lot it was until after the schedule was made.

Q. Was there any other lot in that block marked in litigation?

A. Not that I know of. I learned of this after the schedule was made. The parties who claimed it never came to me and talked to me about it, but I heard afterwards that they had been talking to  
Mr. Bradford about it.

317 Q. Was Mr. Bradford present when you changed it?

A. No sir, he had gone to Ardmore.

Q. Had application been made to change that before Bradford left?

A. No sir.

Q. You didn't ask anybody about it?

A. No sir, I schedule- to the first man that appeared and certified that he was the owner of the improvements. I did not care who it was, and no one else claimed them.

Q. When was it that you erased the words "in litigation"? How long before you closed up the records?

A. I do not know.

Q. Did you know that other parties had been there to see you in reference to that lot?

A. Not until after it was schedule-, they never said anything to me about it.

Q. Was that changed while Mr. Bradford was there?

A. I do not know I don't think it was.

Q. When did he leave?

A. I don't know, he was not here all the time, I think his father died and he left and did not come back.

Redirect by LEDBETTER:

Q. Mr. Kelsey you testified to the facts as to your understanding?

A. Yes sir.

318 Q. You have no interest?

A. None on earth.

R. M. BOURLAND being recalled, testified on behalf of the contestants, as follows:

By FECHHEIMER:

Q. Mr. Bourland did you have any conversation with Mr. Kelsey as to how lot 3, block 46 should be schedule-?

A. I did.

Q. State what he said?

A. I asked him if he had listed that lot in litigation and he said he had.

No cross-examination.

H. B. JOHNSON being recalled testifies in rebuttal as follows:

By FECHHEIMER:

Q. Mr. Johnson state if you had any conversation with Mr. Kelsey or saw him list lot 3 block 46 in Chickasha?

A. Mr. Kelsey and Mr. Bradford called on me to list lots 1 and 2, and at that time Mr. Kelsey said that lot 3 was in litigation and that they would just mark it so and go on.

Q. And they marked it?

A. Yes sir.

319 Cross-examination by LEDBETTER:

Q. Mr. Johnson where were they at that time?

A. In the First National Bank.

ROY G. BRADFORD being recalled testified on behalf of the contestants as follows:

By FECHHEIMER:

Q. Were you present when this schedule of lot 3, block 46 was being made up?

A. Yes sir.

Q. Was Mr. Kelsey present?

A. At the time the lot was first spoken of Mr. Kelsey was present, Yes sir.

Q. Who was that lot schedule- to?

A. Vacant. In litigation?

Q. Who made the entries?

A. There were two entries, made; Mr. Kelsey carried one and I carried the other.

Q. That was just a preliminary investigation?

A. Yes sir.

Q. Simply a preliminary investigation they met around on the street?

A. Yes sir.

Q. That was not the final schedule?

A. Both of these entries, stood, but they were not final.

320 Q. That was not the final entry you sent into the department?

A. Yes sir, most of them.

Q. Was that the final entry sent into the department?

A. Yes sir, that was the only one we had.

By ALLEN:

Q. This final entry you sent into the Secretary, was that sent into the Secretary or not?

A. We made that as a notation the same as we made the others.

Q. Then you made the schedule out afterwards?

A. It was copied on the typewriter by the Clerk at Ardmore.

By FECHHEIMER:

Q. Who had charge of the office here at Chickasha?

A. The notices that Hefley had printed were signed "Roy G. Bradford, Clerk in Charge."

Q. And while you had charge of the records Mr. Sayer, in behalf of Bourland and Cross, called on you?

A. Yes sir, and told me that the lot was in litigation.

Q. Mr. Riddle also called on you for the other party and told you that the lot was marked "in litigation"? At that time the lot was listed in litigation?

A. I could not say.

Q. The last time you saw it, it was marked "in litigation"?

A. Yes sir.

Q. If there was any alteration or erasure made it was made after you left?

321 A. I could not say to that, it might have been made and I not notice.

Q. But you as Clerk in Charge, listed it "in litigation"?

A. Yes sir.

Q. Were those your instructions from the Commission?

A. As I understood them, yes sir.

Cross-examination by LEDBETTER:

Q. What do you mean by instructions as you understood them?

A. When I was taken into the office of the townsite Commission, I suppose about the 4th of February, Mr. Hefley told me that I would be sent to Chickasha shortly and that he would give me the instructions as he received them in regard to scheduling improvements on the lots and the plats to be used as to the size of the lots

and to make the notation on the schedule. There had been an ink schedule made of a portion of the lots and I had that to go by and I started out and changed it then on that in pencil and then would mark them in ink and send in to Mr. Hefley.

Q The schedule that was finally made up of lots in Chickasha and sent to the department did not show the lot in controversy here was in litigation, did it?

A. It evidently must have shown it because notice of appraisal was made.

Q. As a matter of fact you understood your instructions  
222 to be that whenever there was a contest over a lot, the lot was to be scheduled as in litigation regardless of the ownership of the improvements, that was your construction of the instructions?

A. Not the lot proper, the ground belonged to the Chickasha and Choctaw Nations.

Q. What was your instructions?

A. My instructions were where the property, the improvements were in litigations, to schedule it so.

Q. If the improvements were not in litigation then you were to schedule the lot to the person who certified that he owned the improvements?

A. Yes sir.

Q. Now when you made that notation you spoke of at the instance of Mr. Sayer, you understood then that there was some litigation over the improvements otherwise you would not have marked it as in litigation.

A. No sir.

Q. You say you left here about the 30th of March?

A. Yes sir, I think it was about the 30th.

Q. Under your instructions, if you had ascertained that there was no litigation over the improvements on the lot in controversy would you have erased that notation that the lot was in litigation.

A. I don't know that I would have erased it. I would  
323 have simply passed it up and referred it to Mr. Hefley, Chairman of the Commission. After I heard what I did about the property I just passed it up and told them I would refer it to Mr. Hefley, Chairman of the Commission.

Q. When did you say you would refer it to Mr. Hefley?

A. Mr. Riddle and I had a conversation and I said I would not do anything more about it, and that when Mr. Hefley would come he would settle it.

Q. The notation of yours was simply intended to be a temporary notation to be disposed of subsequently?

A. Yes sir.

Redirect examination by FECHHEIMER:

Q. You called Mr. Hefley's attention to this lot?

A. Yes sir.

Q. And he never passed any opinion on it?

A. No sir, not in my presence.



Contestees offer in evidence complaint in the case of R. M. Bourland and J. E. Cross vs. D. H. Johnson, F. E. Riddle, Matt Cook and J. P. Ellis; also the demurrer of the defendants in that case, Matt Cook, J. P. Ellis and F. E. Riddle; the complaint being filed July 15th, 1902 and the demurrer Sept. 29, 1902.

Contestants object to the introduction of the papers in case No. 694 for the reason it is incompetent, irrelevant and immaterial to this contest and for the further reason that it was an attempt to enjoin the Governor of Chickasaw Nation and the Principal 324 Chief of the Choctaw Nation and the U. S. Indian Agent and the Secretary of the Interior from executing and delivering patent to said lot.

LEDBETTER: And plaintiffs in said suit also sought to enjoin respondent herein and J. P. Ellis from receiving said patent upon the ground alleged by applicants herein and upon which they rely now to cancel the schedule and have patent issued to them. We also file the judgment of the court sustaining the demurrer of defendants to the complaint.

#### *Agreement.*

It is agreed that certified copies of the orders and judgments of the court upon said demurrer and dismissing said petition in equity shall be filed within ten days.

By ALLEN:

Thirty days will be given to contestants to make and file briefs, copy of which must be served upon the contestees, and ten days thereafter given to the contestees to make and file their brief, a copy of which must be served upon the contestants.

325 The certification of the record in said contest No. 1784 is hereby waived by the plaintiff in the above cause and it is agreed that all of said testimony and all the record copied therein may be considered by the court to the same extent that the court might consider the original testimony and documents referred to therein.

The object of this agreement is to make the foregoing testimony take the place of the original evidence on the trial of the said contest if now offered in this court, but subject to such other objection as might be legally offered to said testimony if here originally offered; but the plaintiff herein expressly objects to the introduction of any and all of said evidence and documents for the reason they *they* and each of them are incompetent, irrelevant and immaterial, and for the further reason that the defendants herein have not disputed any questions of facts determined by the said United States Inspector for the Indian Territory, the Commissioner of Indian Affairs or the Secretary of the Interior, and for the further specific reason that the determination of any and all facts involved in said contest No. 1784, by said Inspector, Commissioner of Indian Affairs and Secretary of the Interior is binding upon this court in this case, and all the parties to this agreement.

It is further agreed that the objections to the introduction  
 326 of said evidence and to the several documents contained  
 therein shall be considered as having been made to the testi-  
 mony of each of said witnesses and to each of said documents  
 mentioned in the foregoing evidence which was before the land  
 department.

It is further agreed that the following is the opinion rendered  
 by the United States Indian Inspector for the Indian Territory in  
 said contest case No. 1784.

"Case No. 1784.

October 8, 1906.

Case No. 1784.

E. B. JOHNSON and H. B. JOHNSON, Contestants,  
 vs.  
 F. E. RIDDLE and MATT COOK, Contestees.

Involving Title to Lot 3, Block 46, Town of Chickasha, Chickasaw  
 Nation, Ind. Ter.

C. M. Fechheimer, Attorney for Contestants.

W. A. Ledbetter, A. C. Cruce and Frank M. Bailey, Attorneys for  
 Contestees.

Erratum to the decision in the above entitled case as rendered  
 October 1, 1906.—It having been brought to my attention that an  
 error was made in the original decision the following erratum is  
 therefore issued:

On page 11 at the end of line 7 where the word "contestees" ap-  
 appears should read "contestants." On page 24 on line 8  
 327 where the word "contestants" appears should read "con-  
 testees" and line 9, page 24, where the word "contestees"  
 appears should read "contestants." On page 18 in line 9 from the  
 bottom the word "make" should read "Mark."

The above changes will be considered made and this erratum is  
 made a part of the original decision herein.

J.L.A./B.A.R.

J. G. WRIGHT, *Inspector*.

328

Department of the Interior,

United States Indian Inspector for Indian Territory.

Case No. 1784.

MUSKOGEE, IND. T., October 1, 1906.

Case No. 1784.

E. B. JOHNSON and H. B. JOHNSON, Contestants,

vs.

F. E. RIDDLE and MATT COOK, Contestees.

Involving Title to Lot 3, Block 46, Town of Chickasha, Chickasaw Nation, Ind. Ter.

C. M. Fechheimer, Attorney for Contestants.

W. A. Ledbetter, A. C. Cruce and Frank M. Bailey, Attorneys for Contestees.

*Decision of the Inspector.*

Statement.

Contest was duly instituted by the contestants against the contestees and with their said complaint filed an application to have lot 3, block 46, town of Chickasha, Chickasaw Nation, Indian Territory schedule- to them. There *is* attached as exhibits two deeds and court documents together with transcript of record and decision of the U. S. Court in other cases and consecutively numbered from "A" to "L" inclusive, and for ground for affirmative relief set out the facts to be, that in the year of 1892 one, Theodore Fitz-

329 patrick purchased the right of possession to lot 3m block 46 in the town of Chickasha, Chickasaw Nation, Indian Territory, and that on the — day of — 1897 the said Theodore Fitzpatrick leased the said premises to one Theodore Barnhart who afterwards leased the same to one J. P. Ellis who subsequently thereto paid the rent to the said Fitzpatrick until the first day of April, 1898. On the 7th day of July, 1898, Theodore Fitzpatrick filed suit in the U. S. Court for the Southern District of Indian Territory at Chickasha against the said J. P. Ellis for the possession of the said premises alleging as grounds therefor the failure of the said Ellis to pay the rent then due. That on the 8th day of April, 1899 and during the pendency of the said suit Theodore Fitzpatrick and Mary Fitzpatrick, his *wfie*, conveyed all their right, title and interest in and to said premises to one Ella Cross. Thereafter and to-wit on the 18th day of September, 1900, the said Ella Cross together with J. E. Cross, her husband conveyed an undivided  $\frac{1}{2}$  interest in said lot 3, block 46 to one R. M. Bourland and afterwards on the 25th day of May, 1903, the said Bourland together with Willie Bourland his wife, and the said Ella Cross

and J. E. Cross her husband, conveyed the property in question to contestants, E. B. and H. B. Johnson, who claim to be the owners of said lot and entitled to have same schedule- to them.

It is further claimed by the contestants that the suit as brought in the U. S. Court for the Southern District of Indian Territory, wherein Theodore Fitzpatrick is plaintiff vs. J. P. Ellis defendant for the possession of lot 3, block 46, city of Chickasha, Indian Territory, wherein the said plaintiff alleges that he was the owner of said premises and entitled to the possession of same, was tried on the 20th day of October, 1900 and judgment rendered in favor of plaintiff Theodore Fitzpatrick for the possession of the premises sued for, and thereafter the defendant J. P. Ellis prayed an appeal to the U. S. Court of Appeals in the Indian Territory; that on hearing of said case in the United States Court of Appeals in the Indian Territory, the court affirmed the judgment of the U. S. Court for the Southern District for the Indian Territory at Chickasha. Thereafter the said Ellis appealed said case from the U. S. Court of Appeals in the Indian Territory to the U. S. Circuit Court of Appeals for the eighth circuit and filed a transcript of the record on the 24th day of January, 1902, that thereafter on the 27th day of October, 1902, the said U. S. Court of Appeals for the Eighth Circuit affirmed the decision of the Court of Appeals for the Indian Territory.

While all this proceedings was being had between the parties in the courts, contestants claim that when the townsite commission for the Chickasaw Nation visited the town of Chickasha, which was in February and March, 1902 for the purpose of scheduling property to rightful claimants, one Dade D. Sayer appeared before the Townsite Commission in the City of Chickasha and while said commission was making a schedule of the improvements upon lots within the said city, listed the lot in controversy as in litigation; that the said Sayer was an attorney in the City of Chickasha — went to the Chickasaw Townsite Commission at the instance and request of the said Bourland who was then a party to this litigation pending, with reference to said lot.

Contestants further claim and charge that thereafter and without the knowledge or consent of the Chickasaw Townsite Commission, A. W. Hefley and Wesley M. Burney or one Roy M. Bradford, the clerk in charge of said schedule, fraudulently changed said schedule in this to-wit; the words "In litigation" were erased and the names of F. E. Riddle and Matt Cook inserted. In support thereof offer two letter- written by the Chairman of the Board relative thereto; that neither the said Ella Cross or R. M. Bourland or Dade D. Sayer, their attorney had any knowledge of the fraudulent erasure or altering of the schedule of said lot 3, block 46, until after possession thereof had been obtained under the mandate of the U. S. Court of Appeals for the Eighth Circuit and the tender of the appraised value of the lot, to-wit, \$375 to J. Blair Shoenfelt, the then U. S. Indian Agent and requested the receipt for same, it was then and not until then were they, the said Cross, Bourland or Sayer informed that the lot had been

schedule- to F. E. Riddle and Matt Cook. That the said Bourland and Cross had made final payment upon said lot in the sum of \$375 and the said sum as tendered by the said Bourland and Cross was returned to them. Other charges are made against the contestees and their grantors some of which are serious, but I do not deem they enter into the rights of either contestants who ask to have the lot in controversy schedule- to them or of the rights of the contestees.

The contestees for their claim assert and protest, first that the application as filed is insufficient in this that it fails to show any legal reason or any authority in the Indian Inspector to cause patent to issue to contestants. Second they further protest that said application shows on its face that the said Indian Inspector and the Interior Department have no jurisdiction over said matter to hear and entertain a contest and pass upon the title to said property. Third, they further protest and except to said application proceedings deny the authority of said officers to entertain the same or pass upon the title to said property for the reason that the title to said property is now pending in a certain suit in the U. S. Court at Chickasha, wherein the contestees are plaintiffs and the said

333 Bourland and Cross together with others are defendants and it appears in said application that the applicants herein claim their alleged right in and through the said R. M. Bourland and Ella Cross and for the reason the Indian Inspector has no further jurisdiction to hear a contest or to decide the title to said property.

In way of answer they emphatically deny that in 1892 Theodore Fitzpatrick purchased the right of possession in and to the lot in question but allege that the said Fitzpatrick was then as well as now a citizen of the United States and not a member of any Indian Tribe or Nation in the Indian Territory and that he the said Fitzpatrick undertook and attempted to purchase a piece of vacant and unimproved Indian Land belonging exclusively to the Choctaw and Chickasaw Nations, but that the said Fitzpatrick never at said time or any other time had possession of said land or of any of the improvements situated thereon.

Contestees admit that the said Theodore Barnhart some time during the year of 1892 or 1893 erected and built upon said lot a certain building about 20 feet wide and 40 feet long of the value of \$150 and that he was the exclusive owner of all the improvements situated upon said lot and continued to be the owner of the same up until the year 1897 when he sold all of said improvements to J. P. Ellis one of the co-testees together with the right of occupancy

334 of said lot; that the said Theodore Barnhart at the time he sold said improvements and right of occupancy to the said Ellis had the legal right to sell the same as it was done and the same was sold to Ellis without any knowledge that any one else claimed any right or interest therein and to said lot. Third, Contestees deny that the said Fitzpatrick sold any title or interest within and to said lot to the said Ella Cross and deny that the said Ella Cross sold any right, title or interest within and to said lot to the said R. M. Bourland either as alleged in the complaint or ap-

plication and deny that the said Theodore Fitzpatrick had any right, title, or interest in aid to said lot to transfer and deny that the said Ella Cross had any right, title or interest in and to said lot which she could sell or transfer to the said Bourland as alleged and they deny that the said Bourland and Cross sold any right, title or interest in or to the said lot to the contestants herein.

Contestees admit that the said Fitzpatrick in the 7th day of July, 1898 filed an unlawful detainer suit in the U. S. Court at Chickasha, Indian Territory against one J. P. Ellis and others for the possession of said lot but deny that either the ownership of said lot or right to purchase the same or either the ownership or any controversy whatever as to the ownership of said improvements situated on said lot were in any way involved in said litigation, but, 335 on the contrary, it was admitted by the said Theodore Fitzpatrick that all the improvements upon said lot in question belonged solely to the said J. P. Ellis. That the said Fitzpatrick never at said time and has never since said time claimed any right, title or interest whatever in and to any of the improvements situated on said lot.

Contestees further answering say that the title to said lot and the title to the improvements could not under the law in any way be effected or litigated or brought in question in said unlawful detainer suit as was shown therein and rely upon section 3365, Mansfield's Digest, Chapter 57, under the head of unlawful detainer, which said chapter and section were in force in said time in the Indian Territory, said section being in words and figures as follows, to-wit:

"In trials under the provisions of this Act the title to the premises in question shall not be adjudicated upon or given in evidence except to show the right to the possession and extent thereof."

Contestees admit that said cause was appealed to the Court of Appeals of Indian Territory but deny that the U. S. Court of Appeals did in fact or did undertake to adjudicate the rights, title or interest in said lot or either the right to purchase the same or the right or ownership of the improvements in any way, 336 but that the only question determined by either of said judgments of said courts was that the complaint in question stated a good cause of action for an unlawful detainer suit.

Contestees deny that said lot was wrongfully scheduled to them and deny that there was any fraud of any kind practiced or perpetrated upon either the applicants or the townsite commission who were then scheduling the town lots of Chickasha; they deny that said lot was schedule- as in litigation as alleged and allege that prior to the time the members of the townsite commission came to Chickasha for the purpose of scheduling the lots, the said R. M. Bourland and J. C. Cross in person and by their attorneys appeared before said clerk of said townsite commission and represented to said clerk that said lot was in litigation but without explaining the said situation to them and for the purpose of calling the attention of the commissioners to said matter in order that said commissioners might take action thereon upon such representations said Clerk

made a notation upon the record that said lot was in litigation, but that said notation was not intended as a schedule of said lot but simply a memorandum for future reference. Contestees allege and say that the title to the said lot was not in fact at said time in litigation

and that said improvements on said lot were not then, 337 and have never been in litigation and the ownership thereof was not at said time, and had never been, questioned. It has been admitted at all times and by all parties claiming interest therein in said property that the said J. P. Ellis was the sole owner of all the improvements situated upon said lot prior to the time he sold said right to contestees herein and there was no dispute or litigation of any kind over said improvements and especially at the time said lot was scheduled by the commissioners to the contestees herein, that contestees were the only parties to whom said lot could be legally and rightfully scheduled.

Contestees further allege that after the said J. P. Ellis had purchased the improvements and possessory right to said lot from the said Theodore Barnhart, he, the said Ellis, erected thereon other and additional improvements to the amount of seventy five dollars, the same being a three room house and that he rented the same for thirty-seven dollars and fifty cents per month; that the said Ellis was the sole and absolute owner of said improvements and the occupancy of said lot and that prior to the time said lots were scheduled in the city of Chickasha contestees purchased all of said improvements upon said lot from the said Ellis. After said purchase was so made contestees appeared before said townsite board with the deed which had been executed by the said Ellis to the said contestees and certified that they were the said and only owners 338 of said improvements and the rights of occupancy and that

the same was not in any way in litigation; that their title was not in any way questioned and upon said statement and representations said lot was rightfully scheduled to them by said townsite commission. That on the date the "Curtis Act" or "Atoka Agreement" took effect and on the day the said town of Chickasha was laid out by the townsite commission all of the said improvements situated upon said lot was owned by the said J. P. Ellis and such improvements were permanent, substantial and lasting and were other than temporary houses and fencing. That prior to the time said lot was scheduled to contestees herein, they purchased all of the said improvements and at the time the said lot was so scheduled the contestees were the exclusive and sole owners of valuable, permanent and lasting improvements upon said lot other than temporary houses, tillage and fencing.

Contestees further state that neither the said Bourland and Cross nor did their said attorneys at any time during the time said townsite commission was scheduling lots in the city of Chickasha appear before said commission and make any claim of ownership in or to any interest in the improvements situated upon said lot; nor did said parties in person or by attorney demand that said lot be scheduled to them by reason of being the owners of any improvements thereon; nor did said parties file any contest before the commission or in any other way controvert contestees' 339



ownership of said improvements, but on the other hand simply represented to the clerk of the said townsite commission that said lot was in litigation thereby leading said clerk at said time to believe that the improvements on said lot, as well as the possession to said lot, were in litigation and by reason thereof caused the notation to be made on the record as aforesaid.

Contestees further allege and say that said applicants claim no other right or interest in and to said lot except that they attempted to purchase, from Bourland and Cross, long after said lot had been schedule- to the contestees, with full knowledge that the same had been schedule- to them; with full knowledge that contestees were the absolute and sole owners of all the improvements upon said lot prior to the date the same was schedule- to contestees and long after judgment had been rendered against said Bourland and Cross in a certain equitable proceedings instituted by contestees as more fully set out as follows: That on the 15th day of July, 1903 after said lot had been schedule- by said townsite commission to the contestees,

the said Bourland and Cross filed their petition in equity 340 in the U. S. Court at Chickasha, Indian Territory against the said Ellis, D. H. Johnson, G. W. Dukes and J. Blair Shoenfelt, U. S. Indian Agent, and contestees herein who are named defendants, then follows a copy of the petition as filed herein, that after the issues had been joined in said case, the plaintiffs dismissed their said suit in open court and judgment for costs was rendered against plaintiff. There-*after* contestees assert that by reason of this equitable proceeding and by reason of the judgment so rendered therein the title of the said lot was declared against the said Bourland and Cross and in favor of contestees and said Bourland and Cross have, ever since said date, been estopped and are now estopped from setting up any of said matters, any right, title or interest in and to said lot, are estopped from questioning and against contesting any irregularity or matter in regard to said title to contestees and by virtue and reason of said proceedings and judgments as rendered the title and right to said property was adjudicated in contestees.

A hearing was had in said cause on the 26th day of May, 1906, at Chickasha, Indian Territory.

### *Opinion.*

At the hearing of said contest case the following agreement was entered into:

341 "In the matter of the application of E. B. & H. B. Johnson vs. F. E. Riddle and Matt Cook, to have schedule to them lot 3, block 46, town of Chickasha, Chickasaw Nation, Indian Territory, it is admitted by all the parties to the suit that lot 3, block 46 mentioned in the case of Fitzpatrick vs. Ellis and mentioned in the judgment in the said case in the United States Court for the Southern District of the Indian Territory, and in the opinion of the United States Court of Appeals for the Indian Territory in the case entitled Ellis vs. Fitzpatrick and reported in

the 64 S. W. Reporter and the lot 3, block 46 in the case of *Ellus vs. Fitzpatrick* reported in Vol. 55 of the Circuit Court of Appeals reports is the same lot in controversy in this proceeding. It is agreed by the parties hereto that all the documents attached to the application of H. B. Johnson and E. B. Johnson may be admitted in evidence but the competency and relevancy of the same is objected to by the contestees."

The lot in controversy has been in litigation in the Courts of the Indian Territory for the past three or four years. I am in doubt as to whether the contestants had any right to file this application which is in itself a contest. Rule No. 1, of the Rules of Practice Governing contest cases before townsites commissions in Indian Territory which was approved by the Department of the Interior August 29, 1904, is as follows:

342 "Where there are conflicting applications covering the same lot the commission must decide without unnecessary delay to whom they will schedule the lot. The adverse party or parties must at once be notified that their applications can not be considered unless they desire to contest. Advice of this action must either be served, personally upon the losing claimants or by registered mail, and evidence of such service filed with the papers. Notice should also be given that contests can only be given by filing a formal complaint, or petition properly verified, setting forth the facts which constitute the ground of contest. This petition must be filed in duplicate within ten days from the service of notice, failing in which the application will have forfeited any claims he may have had to the property described."

The contestants in this case knew or by the exercise of ordinary case should have known that the contestees claimed some right in and to the lot scheduled to them and I hold that contestants did know of claim of contestees, which is indicated by the letter received as early as September 26, 1902, signed Potter & Potter who appeared to be attorneys for Bourland. Correspondence relative to the scheduling the lot continued by the attorneys up and until and including the 31st day of July, 1903, when the contestant,

343 H. B. Johnson, remitted to Honorable J. Blair Shoenfelt, the then U. S. Indian Agent at Muskogee, a draft for two hundred and eighty one dollars and twenty five cents, same being three-fourths payment on the lot in controversy. Contestants states in said letter that "this lot has been in litigation and the U. S. Circuit Court on January 3, 1903, awarded the lot to Theodore Fitzpatrick and that Theodore Fitzpatrick has assigned his interest to Ella Cross and the said Ella Cross having assigned her one-half interest to Bourland. Attorneys for Messrs. Bourland and Cross have heretofore paid you the first one fourth payment on this lot," and concluded the letter by stating that "we understand that the attorneys for parties claiming this lot have tendered the Government payment. We respectfully state that this was done through fraud and we would like to have you return the payment and issue Bourland and Cross their receipt in full upon the payment of lot 3, block 46, town of Chickasha, Indian Territory."

Contestants cannot at this time claim or set up that they did not know that contestees were claiming same right or interest in and to the lot in controversy, be innocent purchasers and then file their contest contesting the contestees' right to have the lot scheduled to them. They purchased with notice and cannot now be heard to complain.

344 The rule as above set forth distinctly states that where there are conflicting applications covering the same lot the commission must decide without unnecessary delay to whom they will schedule the lot. This lot was scheduled by the Chickasaw Townsite Commission to the contestees thereby indicating that there was no conflicting application and if the contestants did not receive their notice of appraisal in due time, it was their duty to at once investigate the matter and file a contest.

Exhibit 1; as offered in evidence is a letter written by Arthur W. Helley, Chairman of the Chickasaw Townsite Commission and bears date of September 30, 1902, in which he states as follows: "After the appraisal was complete I did not personally examine the schedule with care and consequently did not notice that any change had been made in scheduling the lot in question. The schedule of appraisements was approved and notice of appraisal was served. While I was in Chickasha in the latter part of June one of the attorneys for adverse claimants called my attention to the fact that notice of appraisements had been served upon Francis E. Riddle and Matt Cook for lot 3, block 46, upon my return to Ardmore, I examined the original schedule of Chickasha and discovered that an error had been made and that the lot was appraised as above."

This is conclusive to my mind that the contestants or their grantors knew that the lot was being claimed by the contestees and should have filed their contest within 10 days after the notice

345 of appraisal had been served according to the rule No. 1 of the Rule of Practice and I am of the opinion that the application and complaint of contest as filed herein comes too late and that this case should be dismissed, however both contestants and contestees desire an opinion rendered herein upon the testimony as introduced with special findings of fact and the same will be done.

It is the principal contention of the contestants that the contestees induced a clerk to alter and change the record of the townsite commission who was scheduling the lots in the town of Chickasha and in support of their contention offer as a witness one Roy G. Bradford who testified that in 1902 he went to work for the townsite commission of the Chickasha Nation as townsite clerk and that he commenced performing his duties as said clerk on the 8th day of February, of said year and testified in his direct examination that one, J. B. Kelsey was his assistant and in going over the property in Chickasha, "we simply marked down who was the owner of the improvements. We came to the first lot and that was listed to one Johnson and the second lot was listed to one Johnson, in speaking about the third lot something was said about the lot being in litigation or contest and to the best of my recollection was passed over

at that time, later on in conversation with Mr. Sayer I was informed that the lot was in litigation and so marked it on the schedule. I also think, but I am not sure and could not swear to it, that I had a conversation with Mr. Riddle in regard to the matter and also Mr. Hamilton in the office one day, I think I was sitting in my office and Mr. Hamilton was across the hall and we got to talking about this lot and whether I should mark it in litigation or contest" and in response to the question "How did you mark it" he answered, "I marked it in litigation."

He further testifies on page three of the record as follows:

Q. Was it so marked in litigation when you left Chickasha with the records?

A. So far as I know.

Q. Did you change it?

A. No sir.

Q. Did Mr. Riddle ask you to do anything in reference to the lot?

A. I had a conversation with him something about the lot but what it was I could not swear to."

At the time they were scheduling these lots in Chickasha the witnesses testified on page 4 of the record that to the best of his recollection there was a frame building thereon; that said building was occupied as a dry goods and notion store and in reply to the question, "Did you make any inquiry as to who the owner of the building was?" the witness answered, "No, sir, I was informed by an attorney that the lot was in litigation, and I believe if the application could be found they will find an application with a notation on the bottom of it in regard to the matter signed by one of the parties who claimed to be the owner of the improvements?"

Contestees offered one J. B. Kelsey who testified that he first became acquainted with lot 3, block 46, in the town of Chickasha in February, 1902, when he was acting in the official capacity in representing the Chickasaw Townsite Commission in scheduling property in the city of Chickasha; that he received his appointment by and through the U. S. Indian Inspector, that he made a preliminary schedule of the town of Chickasha, which was done prior to the time the final schedule was made. On page 47 of the record he testifies as follows:

Q. Do you remember the occasion of scheduling lot 3, block 46?

A. Yes, sir, I scheduled it.

Q. Was there any evidence as to the ownership of the improvements presented to you at that time?

A. Yes, sir, the parties brought a bill of sale and showed it to me and then certified that they owned the improvements and I had nothing more to do than to schedule it to them.

Q. Do you remember any records showing the lot in litigation?

A. Prior to that—I don't remember whether Mr. Bradford was in the office or not, but prior to that time I saw opposite that lot the words "in litigation" and since listening to this testimony today my

recollection is that I called Mr. Bradford's attention to that but I am not certain but think I called his attention to that and asked him what was meant and he said some parties came up and stated that it was in litigation. I asked him if it was the improvements and he said no, it was the lot. I said our instructions were to schedule the lots to the owners of the improvements and we could not pay any attention to the lot and did not care anything about that. A day or two after that Mr. Bradford left. I think his father died, and I finished the work.

Q. What became of that record?

A. I erased it. I examined the papers after Mr. Bradford left, he did a good deal of the work, I could not find any contest filed, no papers showing that the lot was in litigation and I had nothing to do except to schedule it to the first one that appeared that would certify that they owned the improvements.

A. Did you have any conversation with Mr. Riddle at the time of erasing it?

349 A. I don't think I did. I think I erased it on my own motion for the reason that my instructions were to schedule to the owner of improvements."

On cross-examination it was sought to make the witness testify that he told Mr. Bourland that he had scheduled the lot in litigation which is emphatically denied by the witness and in reply to the question, "Were not your instructions where there was any controversy to make them in litigation?" the witness answered, "No sir, not unless some one laid claim to the improvements." "You were the Judge and not the Commission?" "I worked under the direction of the townsite commission."

The only question to be determined in this case is who owned the improvements upon the lot in controversy at the time the townsite commission scheduled the same. The U. S. Court of Indian Territory had issued restraining orders against any one party, who sought to appropriate the rights of others in and to lots, but such restraining orders were to the extent that those restrained should not interfere with the rights of the applicant until it could be decided by the Department who the lot in controversy should be scheduled to.

This was done merely to protect then the rights of those who sought the restraining order and to keep those who had no  
350 interest in and to the property from jumping or taking possession of the same. There is no contest between either the contestants or contestees as to the chain of title set out in their complaint both set out from whom they obtained title, the only question then for this department to decide is what does the evidence show relative to the ownership of the improvements.

There is introduced by contestees, Exhibit "2" signed by Ellis, the grantor of contestees, and by H. B. Johnson one of the contestants, which is in words and figures as follows:

INDIAN TERRITORY,  
Southern District:

This agreement made and entered into on this day by and between J. P. Ellis, party of the first part and H. B. Johnson party of the second part; Witnesseth: That party of the second part being desirous of using the rear end of lot No. 3, in block 46, owned by the party of the first part, and he hereby agrees to erect good substantial water-closets, and to fence the same in with a good board fence, and to be paid for the use and rent of said premises. It is specially agreed that said improvements so erected shall be owned by and be the property of party of the first part, and he hereby rents and lets the same to said second party to be used by 351 him and his tenants for water closet purposes and as a back yard, for a term of 12 months, and until the same are paid for in full subject to the provisions hereafter mentioned, in case party of the first part should not be compelled to use the same after the expiration of first 12 months and in that case he shall pay party of the second first part the cost of said improvements less the use of same for the said 12 mos. which is agreed upon to be at the rate of one dollar per mo. It is agreed that the tenants of party of first part shall have the privilege of using one of said closets, so long as they do so without molesting party of the second part and his tenants by using same in such way as to interfere with said second party and tenants. In case any disagreements should arise, and not settled satisfactory by said parties otherwise then said first party shall have the right of paying the said second party the full cost of said improvements and take full possession of same.

Witness our hands this Jan. 1st, 1902.

J. P. ELLIS.  
H. B. JOHNSON."

52 This instrument is dated January 1, 1902, the contestant herein who is a party to the contract, admits the title to lot 3, block 46, to be in Ellis the grantor of contestee herein, how can contestants go back to this is more than I can understand.

There is among the files in this case an affidavit of B. B. Barefoot who makes the oath that he tendered to Matt Cook and F. E. Riddle contestees herein the appraised value of lot 3, block 46, town of Chickasha for Bourland and Cross and demanded they transfer the same to the said Bourland and Cross. If it was the contention of the contestants or their grantors that the said Cross and Bourland had the title or interest in and to the property why was such tender and demand made?

Contestants object to the deposition of J. P. Ellis being introduced for the reason that said Ellis had been arrested and had plead guilty to perjury before the U. S. Court of Indian Territory, but I do not deem that the objection as raised by contestants is good. The Supreme Court of the state of Arkansas in the case of Caser vs. The State reported in 37th Arkansas, page 83, decided this question and held Halfrey was a competent witness for the State. It is a well

settled rule of law that an accomplice who is not indicted or who is separately indicted is he has been convicted and if sentence had not been passed upon him, is a competent witness. This is the law as laid down by Greenleaf and Jones on Evidence as well as Bishop's Criminal Proceedings. Quoting from Bishop on Criminal Law, Vol. 1, section 975, as follows:

"The mere plea of verdict of guilty works no infamy, for until judgment it has not reached the conclusion of guilty, so this disqualification like the common law forfeiture does not come from the mere crime or the mere conviction of it, or punishment or the infamous nature of the punishment, but from the final judgment of the court. Until judgment rendered the accused or indicted person is competent to testify."

In the case at bar Ellis was arrested and plead guilty to perjury but was never sentenced by the Court and was therefore competent to testify and his testimony should be admitted in this case.

It is conclusively shown by the testimony in this case that Ellis erected lasting and valuable improvements upon the lot in controversy long prior to the scheduling of the lots in the town of Chickasha and such improvements were erected while he was in possession of the same.

If such improvements were erected with the consent of his grantor whether Ellis was the owner of the possession rights or not the grantor, or landlord, would be estopped from asserting his rights after permitting same to be done. See Harrod vs. Foley, Creek County Case No. 407, in the town of Eufaula. In this case the

Department held that when persons obtained the rights of possession in and to town lots and sought to erect such improvements as required by law, he thereby obtained the right of possession in and to the property, upon which such improvements are so located.

The evidence in this case conclusively shows and it is nowhere denied that on the 28th day of June, 1898, the date of the "Atoka Agreement" went into effect, the lot in question was improved by lasting, substantial and permanent improvements and such improvements came within the meaning of the law, such improvements were either owned by Ellis or by Fitzpatrick.

Fitzpatrick in his second amended petition in the case of Theodore Fitzpatrick vs. J. P. Ellis et al. alleges as follows:

"That by act of Congress passed July 1, 1898, entitled 'An Act for the protection of the people of Indian Territory and for other purposes' provision was made for the adjustment of title to town lots in towns in the Indian Territory. That in order to comply with the provisions of such act that his right to said premises may be properly protected, plaintiff desires to place substantial, valuable and permanent improvements thereon."

See page 23 of the record.

This must be construed as against the plaintiff and his admission that he does not have lasting and valuable improvements thereon is conclusive. Whatever improvements were upon the lot at the time of the filing of the complaint referred to,



which appears to be the 16th day of February, 1899, was not owned by the plaintiff in that case, and was so construed by the plaintiff. Had the said Fitzpatrick claimed the improvements that allegation would never have appeared in his second amended petition nor such application made for restraining order which was by the court denied.

The attorneys for contestants lay considerable stress upon the law of forfeiture which I hold does not apply in this case.

Contestees raise the question of whether or not the judgment as so rendered in the unlawful detainer suit above referred to was res adjudicata and whether or not it has the effect to vest title of the improvements in the contestant.

Section 3365 of Mansfield's Digest under the head of Forcible Entry and Detainer seems to settle this question, "Under the provisions of this Act, the title to the premises in question shall not be adjudicated upon or given in evidence except to show the right to the possession and the extent thereof."

356 and in citing the Circuit Court of Appeals, 60th C. C. A., page 261, the court states:

"We are of the opinion that the complaint stated a good cause of action for unlawful detainer and as this is the only question which is before this court for review and as it was decided by both lower courts the judgment of each court is hereby affirmed."

This emphatically decides the question of whether or not the rights of the parties to this question were adjudicated in the former allegation, the only question to be decided by the Circuit Court of Appeals was whether or not the complaint stated a cause of action therefore did not decide the rights of the parties thereto. From the authorities cited I do not hold the forcible entry and detainer suit as brought, was res-adjudicata as to the rights of the parties hereto.

It is claimed by the contestees that the dismissal of the complaint in equity as against contestants was res-adjudicata and cited abundance of authority therefor and it must be admitted that there are grounds to sustain the contention of contestees, but I do not hold that this case, would, or should, turn upon this point. The many authorities cited by attorneys for contestees in their brief on this point are ample to support such a contention, but still if the dismissal of the case in the U. S. Court by the plaintiff was res adjudicata as to their right of the contestees and is evidence to show that contestants had forfeited their rights in the property.

Contestees have filed and asked that certain findings of facts be made and the following will be allowed:

First, I find that the lot involved in this controversy is the same described in the pleadings and judgment in a certain unlawful detainer suit wherein Theodore Fitzpatrick was plaintiff and J. P. his defendant, No. — and it appears from the description of said in said pleadings and judgment that neither the number, size or survey of same were changed by the Townsite Commission for the Chickasaw Nation.

Second, I find from the evidence that said Theodore Barnhart

for a valuable consideration, sold and transferred all of said improvements and the occupancy of said lot to one J. P. Ellis some time in the latter part of the year 1897, and that the said Ellis thereafter erected other and additional improvements upon said lot to the value of about \$75.00.

Third. I find that on the 28th day of June, 1898, the date of the final ratification of the Atkoa Agreement, the said J. P. Ellis was the exclusive owner of said improvements aforesaid, and of all the improvements upon said lot.

358 Fourth. I find that on or about the 7th day of July, 1898, the said Theodore Fitzpatrick filed his suit in unlawful detainer in the United States Court at Chickasha against the said J. P. Ellis for the possession of the said lot, and that thereafter he filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendant from preventing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the law to purchase said lot; that said injunction was by the court refused; that said Ellis filed his answer in said cause, denying the allegation of said complaint and as a further defense set up the fact that he was the exclusive owner of permanent, substantial and lasting improvements, other than temporary houses, tillage and fencing, upon said lot.

Fifth. I find that in October, 1900 said cause came on for trial before the court and jury and that the issues were found in favor of said plaintiff for the possession of said lot. That thereafter the defendant Ellis prosecuted an appeal to the Indian Territory Court of Appeals, which was by the court on the — day of —, 1902, affirmed, and that he further prosecuted a writ of error from the

359 decision of that court to the Circuit Court of Appeals for the Eighth Circuit at St. Louis, and that in November, 1902, said decision of the Indian Territory Court of Appeals and likewise the decision of the United States Court at Chickasha was affirmed.

Sixth. I find that none of the improvements upon said lot were in any way in issue in said unlawful detainer suit, and that said J. P. Ellis' ownership of same was not denied or disputed either by the plaintiff, or by the pleadings, but in the pleadings and the evidence the said Fitzpatrick admitted the ownership of said improvements to be in the said Ellis, and they were in no way adjudicated upon in said cause.

Seventh. I find that on the 8th day of April, 1899 and while said unlawful detainer suit was pending the said Theodore Fitzpatrick by his quit-claim deed transferred and quit-claimed to one Ella Cross what interest he had or claimed within and to said lot; and I find that said Fitzpatrick did not claim to own any improvements upon said lot and did not intend or attempt to transfer the same to the said Ella Cross and it is not contended that the said Ella Cross by said quit-claim deed purchased any interest in said

improvements; and I further find that the said Ella Cross and J. E. Cross by their certain quit-claim deed, on the 18th day of September, 1900, quit-claimed their one half interest within and to said lot to the said R. M. Bourland.

360 Eighth. I find that on the date said townsite of Chickasha was laid out by the townsite commission for the Chickasaw Nation and on the date the plats thereof prepared by said commission were finally approved by the Secretary of the Interior, the said J. P. Ellis was the owner of permanent, substantial and valuable improvements other than fences, tillage and temporary houses on said lot.

Ninth. I find that contestants' grantors, Bourland and Cross caused their attorney to appeal before Roy G. Bradford, one of the Clerks of said townsite commission and represented to the said Bradford that said lot was in litigation and the said Bradford was led to believe that the improvements upon said lot were likewise in controversy or in litigation, and that under said impression the said Bradford made a temporary notation opposite the schedule of said lot upon the record, the words, "in litigation," but that said notation was only intended to be a temporary and for further investigation.

Tenth. I find that afterwards contestees herein purchased the improvements upon said lot from the said J. P. Ellis and secured a bill of sale or transfer thereof and went before said Commission and presented said bill of sale and certified that they were the sole and exclusive owners of all improvements situated upon said lot and that the same was not claimed by any one else and one 361 J. B. Kelsey, a duly authorized clerk of said commission, ascertaining that said lot had been erroneously marked in litigation erased the same and duly scheduled the same to said contestees herein.

Eleventh. I further find that as a matter of fact said improvements at the time the same were scheduled to contestees were not in any way in litigation, and that said contestants nor neither their grantors made any claim before said commission that said improvements were in litigation or that they owned any interest in said improvements and made no request or demand that said lot be scheduled to them by virtue of being the owners of any improvements upon the same.

Twelfth. I find from the evidence that about the first of June, 1902, said commission proceeded to Chickasha to serve notice upon all persons to whose lots had been schedule- and appraised of their right to purchase said lots under the provisions of the Atoka Agreement and that notice was duly served upon contestees herein, on or about the 12th day of June, 1902, or their right to purchase said lot under the provisions of the Atoka Agreement and that they duly acknowledged receipt of said notice and about the 19th day of said month they, according to the rules and regulations of the Department, forwarded to the Honorable J. Blair Shoenfelt, U. S. Indian Agent, at Muskogee, Saint Louis Exchange, for the 362 sum of \$375.00, the same being 62½ per cent of the appraisement and the full purchase price of said lot, and that

said agent, on or about the 29th day of said month duly acknowledged receipt of said money as the full purchase price of said lot.

Thirteenth, I further find that one of the contestants H. B. Johnson at all time prior to and until after the schedule of said lot to the contestees herein recognized and acknowledged the said J. P. Ellis and his grantees contestees to be the owners of said lot and that recognizing said ownership on the 1st day of January 1902, he rented a portion of said lot from the said J. P. Ellis and expressly in said lease acknowledged the said Ellis to be the owner of said lot.

All things being duly considered I hold that the lot in controversy described as lot 3 in block 46, in the town of Chickasha, Chickasaw Nation, Indian Territory, should be scheduled to the contestants F. E. Riddle and Matt Cook and the same is so ordered.

J. L. A./L. L.

J. G. WRIGHT, *Inspector.*

363 It is agreed that the following is the opinion rendered by the United States Commissioner of Indian Affairs in said contest case No. 1784.

(NOTE.—Said opinion is hereinbefore set out beginning upon page 114 of this Case-Made, as attached to defendant's cross bill, marked Exhibit G.)

It is further agreed that the following is the opinion of the Assistant Attorney General for the Interior Department on the petition of the Contestants to review the action of the Secretary of the Interior in said contest case, No. 1784.

(NOTE.—Said opinion is hereinbefore set out in full beginning upon page 145 of this Case-Made, as attached to defendant's cross bill and being part of Exhibit G attached thereto.)

It is agreed that each of said opinions may be introduced and considered as evidence in the trial of this cause.

August 20th, 1907.

W. A. LEDBETTER &  
A. C. CRUCE,  
*For Plaintiffs,*  
BIRD & MELTON AND  
C. C. POTTER,  
*For Defendants.*

364 And afterwards, to-wit, on the 26th day of October, 1907, The Special Master appointed by the court in said cause, Hon. J. T. Blanton, filed in said Court his report, which is in the words and figures following, to-wit:

*Special Master's Report.*

365 In the United States Court for the Southern District of the Indian Territory, at Chickasha.

F. E. RIDDLE, Plaintiff,

vs.

W. D. BELL et al., Defendants.

*Report of Special Master.*

This is an action of ejectment brought by the plaintiff for the recovery of Lot three (3) in block forty six in the town of Chickasha, Indian Territory.

Plaintiff alleges that he is the owner of the lot by virtue of a patent issued by the tribal authorities of the Choctaw and Chickasaw Nations in accordance with treaties entered into between said nations and the United States. The defendants answered and filed their cross-bill, alleging that the plaintiff holds the legal title in trust for them and ask that he be required to convey to them.

In the early 90's Theodore Fitzpatrick, having some claim or right to the possession of the lot in controversy leased the same to Theodore Barnhart, who improved the lot by placing a house thereon, which he occupied until the year in 1897, when he sold whatever interest he had therein to one J. P. Ellis, who thereafter occupied the lot as a tenant of Fitzpatrick recognizing him as  
366 landlord. On June 7, 1898, Ellis refusing to pay further rent, Fitzpatrick instituted an action of unlawful detainer in the United States Court at Chickasha for the recovery of the possession of said lot and damages for its unlawful detention. The defendant, Ellis, executed a statutory bond for the retention of the possession of said premises pending the determination of the possession of said premises pending the determination of said litigation. In October, 1900, upon a trial of said cause, Theodore Fitzpatrick recovered judgment for the possession of said lot and thereupon defendant J. P. Ellis prosecuted an appeal in said cause to the United States Court of Appeals for the Indian Territory and to the United States Circuit Court of Appeals where the judgment of the trial court was finally affirmed, the last decision being rendered, October 22, 1902. Theodore Fitzpatrick on the 8th day of April, 1899, conveyed said lot with all improvements thereon, to one Ella Cross, who thereafter, on the 18th day of September, 1900, conveyed an undivided one-half interest therein unto one R. M. Bourland. Mrs. Cross and Bourland thereafter, on the 25th day of May, 1903, conveyed said property to E. B. & H. B. Johnson.

In the early spring of 1902, while the unlawful detainer action was pending on appeal in the United States Circuit Court of Appeals, the townsite commission for the Chickasaw Nation appraised the  
367 property in the town of Chickasha, Indian Territory, pursuant to the Act of Congress of 1898, and scheduled the lot in controversy to the plaintiff, F. E. Riddle and one Matt

Cook, who had just purchased whatever interest the said J. P. Ellis had in said premises, and thereafter the said F. E. Riddle and Mat- Cook paid the necessary purchase price of said lot and in pursuance of law, patent was issued to them in May, 1907. Prior to this time Riddle had succeeded to all of the interest of Cook in said property.

There was a contest had between the defendants herein E. B. & H. B. Johnson, as contestants and the plaintiff- herein F. E. Riddle and Mat- Cook, as contestees, and opinion rendered therein by the United States Indian Inspector, the Commissioner of Indian Affairs and the Secretary of the Interior, awarding the right to purchase the lot under the act of Congress before mentioned to said F. E. Riddle and Mat- Cook.

The court in considering the issues presented by the pleadings in this *cause*, is precluded from a further investigation of the issues of fact, properly before the Department, unless attacked for fraud, but upon the applications of the principles of law governing the rights of the parties to the facts as found, the court is not bound by the conclusions of the Department. And it is further to be borne in mind that if in the determination of the issues of law arising in this *cause* upon the pleadings and the evidence, there arise other questions of law not properly before the Department, it is the duty of the court to apply them and the court is not circumscribed by the fact that such questions were not passed upon by the department.

The defendants assert twelve errors of law of the Department occurring in the trial of this *cause*, and say that if the law in these particulars had been correctly construed, the lot in controversy would have been awarded by the Department to them.

The first alleged error of which defendants complain is as follows:

"The Department erred as a matter of law, in holding that the right to purchase improved lots under the Acts of Congress relating to the platting and selling of town lots in the Indian Territory conferred the right to purchase upon a tenant who had placed improvements upon the property rented, and not upon the landlord."

Other alleged errors urged are:

"Seventh. The Department also erred in holding that J. P. Ellis could make use of a wrongful possession of said lot to acquire the right to purchase the same as an improved lot, thereby rewarding him for his wrongful and unlawful act and permitting him to take advantage of his own wrong."

Eighth. The Department erred in holding and deciding that a party without right could wrongfully and unlawfully hold possession of a vacant lot by entering thereon and thereby excluding the lawful owner from his rightful possession and preventing him from placing improvements thereon, and could by placing improvements thereon himself, acquire the right to purchase the lot as an improved lot, to the exclusion of the said rightful owner.

Ninth. The department also erred in the construction and application of the law in holding and deciding that the Act of Con-

gress providing for platting and sale of townsites in the Indian Territory and the Atoka agreement destroyed the relation of landlord and tenant between Fitzpatrick and Ellis and enabled Ellis to avail himself of his possession under a lease contract to defeat all the rights of Fitzpatrick in and to said lot."

The provision of the treaty bearing upon the question is as follows:

"Said commission shall prepare correct and proper plats of each town and file one in the Clerk's office of the United States District

Court for the district in which said town is located and one

370 with the principal Chief or Governor of the Nation in

which the town is located and one with the Secretary of the

Interior, to be approved by him before the same shall take effect.

When said towns are so laid out, each lot on which permanent, substantial and valuable improvements other than fences, tillage and temporary houses, have been made, shall be valued by the commission provided for the Nation in which the town is located at the price a fee simple title to the same would bring in the market, at the time the valuation is made, but not to include in its value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property."

The Department held that the only question that concerned it was who was the owner of the improvements on the lot in question and it decided this question in favor of the plaintiffs. Whether or not the Department is correct in holding as a matter of law under such circumstances that the tenant or his successors in interest are entitled to purchase the property under the Act in question, or whether it was meant for the benefit of the landlord is a question of law. If the department erred as to this question, then it is the duty of this court to correct such error by requiring the plaintiff

371 in this action to convey the property to the defendants.

At the time of the negotiation of the treaty, a provision of which is above quoted, many people have settled in the Indian Territory, where they had established their homes and places of business. The improvements they placed upon the Indian Lands technically became the property of the tribes, who could not alienate the same without the consent of Congress. The main object of the treaty was to divest the rights of the tribes in the townsites and permit their purchase by those entitled to them under the general rules of law. The questions arise: Does the fact that the treaty in terms awards the rights to purchase an improved lot to the owner of the improvements disclose an intention on the part of Congress to relieve the tenant of his obligations to his landlord in case he has improved the lot. And was it the intention of Congress in the negotiation of such treaty to permit tenants, who had wrongfully held leased premises after the expiration of their term, and prevented their landlord from entering and improving such lots that they might secure the benefit of the treaty and have the prior right to purchase such lot to the ex-



clusion of their landlord and thereafter hold such lots discharged of their former trusts? I think not. After the right of the tribes to such lands had been divested by the treaty it is to be presumed that Congress in arranging for the sale of such lots did not  
 372 intend to overturn all the rules of law and justice and set at naught all precedent established by courts in the construction of similar laws. A solution of the question involved in this controversy is not to be found in the statute alone but must be had by application of the ordinary rules of law applicable to such circumstances.

From a brief review of the history of the legislation of Congress on the disposition of the public lands of the government and the construction of such laws by the court it is apparent that Congress has ever manifested a commendable solicitude for the interest and the rights of the pioneer and on every occasion has protected such rights.

"With absolute confidence, these pioneers have relied upon the justice of their government, and have never been disappointed. The most striking illustration of this confidence and of the justice of the government are found in the settlement of Oregon and California. Before any laws of the United States had been extended to Oregon, enterprising men crossed the plains and took possession of its fertile fields. They organized a provisional government embracing all guaranties of private rights. They passed laws under which person and property were protected and justice administered with as much care and wisdom as in old communities. They formulated rules and regulations among themselves for the possession of land, and when the laws of the United States were extended over  
 373 the country its regulations were respected and the rights acquired by them were recognized and protected." *Rector vs. Gibens*, 111 United States 276. Again, in *Lamb vs. Davenport*, 18 Wall. 313, that court said:

"It is sufficient here to say that several years before that Act was passed and before any Act of Congress existed by which title to the land could be acquired, settlement on and cultivation of a large tract of land which included the lot in question had been made and a town laid off into lots and lots sold, and that these are a part of the present city of Portland. Of Course, no legal title vested in any one by these proceedings but that remained in the United States all of which was well known and undisputed, but it was equally well known that these possessory rights and improvements placed on the soil, were by the policy of the government; finally protected, so far, at least as to give priority of the right to purchase. Whenever the land was offered for sale, when no special reason existed to the contrary. And though these rights or claims, rested on no statute or positive promise, the general recognition of them in the end by the government and its disposition were to protect the meritorious actual settlers, who were the pioneers  
 374 of immigration in the new territory, gave a decided and well understood value to claims. They were the subject of bargain and sale, and, as among the parties to such contracts

they were valid. The right of the United States to dispose of her own property is undisputable and to make rules by which the lands of the government may be sold or given away is acknowledged; but subject to these well known principles parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases when Congress had imposed restrictions on such contracts."

In view of this disposition of Congress and the courts to protect the first settler upon public land, is it any wonder that the people came to this country under the conditions then existing and subjected to their dominion the fertile land and the advantageous business sites. They had the tacit assurance of Congress, if its course of legislation for a century past could be taken as a precedent that whenever the lands which they rightfully came into possession of were disposed of by the Government, they should have the prior right to purchase. Of course, this did not and could not, apply to the rural lands, for it is evident all the while that they would be require- for the home of the Indian; but as to the urban property it soon became evident to every one that the lots where  
375 cities were springing up, as by magic, would be offered for sale on some terms. That men should take possession of them under such circumstances and esteem them valuable, is but natural. Again these parties who relied upon the tacit promise of our government that they should be protected were not disappointed. The same policy that has ever been manifested towards the pioneer permeated the legislation, and we are to construe the Act in the light of this known, and established policy of our government.

Recurring to the above alleged errors of the land department, complained of by the defendants, it will be observed that they embody the contention that the tenant who acquires the title to the lot under such circumstances is a constructive trustee for the benefit of his landlord or a trustee, *ex maleficio*, as some authors term it.

In Pomeroy's "Equity Jurisprudence," Sec. 155, we find:

"Constructive trusts are raised by equity for the purpose of working out right and justice where there was no intention of the parties to create such a relation, and often directly co-trary to the intention of the one holding the legal title. All instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive, including acts in violation of fiduciary obligations. If one party obtains the legal title to property, not  
376 only by fraud, but by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another equity carry-s out its theory of a double ownership equitable and legal, by impressing a constructive trust on the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner. Court- of equity by thus extending the fundamental principles of trusts that is, the principle of a division between the legal estate in one and the equitable estate in another, to cases of actual or constructive fraud

and breeches of good faith, are entitled to wield a remedial power of tremendous efficacy in protecting the rights of property."

In Perry on "Trusts," Sec. 181, the author says:

"Courts of equity will not only interfere in cases of fraud, to set aside acts done but they will also, after acts have been by fraud prevented from being done, interfere, and treat the case exactly as if the act had been done, and this they will do, by converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done."

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In view of the protracted litigation by which the predecessors in interest of the defendants endeavored to procure possession of the lot in controversy it may well be assumed that the acts of the plaintiffs and their predecessors in interest prevented these defendants and their predecessors in interest from making the requisite improvements upon the lot in controversy. Except for the wrongful acts of the party Ellis in retaining possession the defendants or their predecessors in estate would without question, have improved said lot and as a consequence been accorded the prior right to purchase the same. It may be urged whether or not they would have improved the lot is speculative and conjectural, but when the wrongful acts of the plaintiffs and their predecessors in estate are shown, as in this case, to have prevented defendants and their predecessors from taking possession plaintiffs, are in no position to complain of such conclusions. The mere fact that the defendants and their predecessors in interest did not gain possession of the property and improve it that they might acquire the prior right to purchase it does not absolve the plaintiffs and their predecessors in estate from liability for those wrongs which resulted in producing such a situation. If nothing of the kind had been done, it is fair

378 to presume in the light of the evidence, that the defendants and their predecessors in estate would have improved said property. It does not lie in the power of the wrongdoer, the party whose wrong created that condition which induced the failure to improve, to excuse his wrongs on the grounds that Congress had the power to award the lands to him and might have done it any way.

The State of Wisconsin, in 1874, granted to two railways companies, one, for brevity termed the Omaha Company, and the other the Portage Company, separate parcels of land in aid in the construction by each of them of separate lines of railway in the State, the value of the lands thus granted to the latter company being \$4,000,000.00. The Portage company entered upon the construction of its lines of road and contracted with one Angle for the construction of 65 miles of its proposed line and arranged with him and other interest to secure ample funds for the completion of their line. Angle entered upon his work and was progressing rapidly therewith working 1600 men, when the officers of the Omaha Company by bribery of certain officers of the Portage Company, obtained exclusive control of the capital stock of the latter company. The Portage Company was by them immediately advertised as being

hopelessly insolvent and unable to complete the project undertaken; its officers were enjoined from further operations and its

379 corps of engineers and other employes were discharged. Having completely wrecked the Portage Company, the officers of the Omaha Company went before the Legislature of the State and secured the passage of an act forfeiting the lands theretofore granted to the Portage Company and re-granting them to the Omaha Company, in consideration of its undertaking the project. The Omaha Company afterwards constructed the line of road and received the lands. Angle instituted a suit against the Portage Company and recovered a judgment for over \$200,000, upon which, after having a nulla bona returned, he filed a bill in the United States Court seeking to charge the lands formerly granted to the Portage Company and subsequently to the Omaha Company with a trust in his favor to the extent of the indebtedness mentioned. To this bill the court sustained a general demurrer and the Supreme Court of the United States by Justice Brewer in reversing the action of the trial court, among other things said:

"That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the Contractor and Portage Company is apparant. It is not an answer to say that there was no certainty that the contractor would have completed his contract and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer

380 in case of any wrongful interference with the performance of a contract, for there is always that lack of *containty*. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated and so performed as to secure the land to the company.

It certainly does not lie in the mouth of the wrongdoer in face of such probabilities as attend this case to say perhaps that the contract would not have been completed even if no interference had been had and that, therefore, there being no certainty *and that therefore, there being no certainty* of the loss, there is no liability."

It is to be borne in mind that the tenant bears a trust or fiduciary relation towards his landlord. Perry on "Trusts," Sec. 210, says:

And so the relation of landlord and tenant partner and partner, principal and surety, and tenants in common, may create such influence of trust and confidence that courts of equity will construe a trust to arise out of their contract, or will decree such contracts to be set aside."

Judge Story in his "Equity Jurisprudence," Sec. 323, says:

381 "There are many other cases of persons standing in like confidential relations in which similar principles apply.

Among these may be enumerated the cases which arise from the relation of landlord and tenant, or partner and partner, principal and surety and various others, where various, where mutual agencies, rights and duties are created between the parties by their own voluntary acts or by operation of law."

Pomeroy in his "Equity Jurisprudence" at Sec. 1050, speaks of constructive trusts, saying:

"The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries or who are in possession as tenants of premises in which their beneficiaries are interested. As this rule results from the relation of trusts and confidence existing between the partners, or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all actual and quasi trustees that a trustee or a person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any advantage or profit inconsistent with his supreme duty to his beneficiary."

In *Waggener, et al. vs. McGlothlin, et al.* (33 Ark. 195) the Supreme Court of Arkansas had under consideration the trust relation existing between landlord and tenant. In this case the tenants remained in possession after a forfeiture of the lands to the state for taxes until the period of redemption had expired. At that time there was a law in force in the state which gave to "Citizens or heads of families and actual settlers" upon lands forfeited to the State for taxes, the right to purchase them of the auditor of the State by payment of the taxes with penalty and cost. The tenants took advantage of this statute, made the necessary affidavits, purchased the lands and procured a deed for the same.

The Court says:

"When the property became forfeited to the State for non-payment of taxes, by neglect of the Receiver they (tenants) might have terminated the tenancy by re-delivery of the possession or protected themselves from an eviction by a future purchaser from the state by advancing the taxes and holding a lien for re-imbursements, or, as has been held in this court, in *Ferguson vs. Etter*, 21 Ark. 160, if the lands had been sold for taxes at public sale during that tenancy they might have bid, and set up a title thus acquired against that of the Receiver. The fact that the property was in the custody of the court did not, of itself, prevent the collection of revenue and could not retard it. But they availed themselves of the possession which they held as tenants, as a basis to acquire title as actual settlers, which no one else under the circumstances could have acquired against them. They had no right to make use of a possession thus acquired, to found upon it a claim hostile to the landlord; if they had intended that, they should have restored possession that the landlord could have been free to contest the validity of the forfeiture to the State. When they purchased from the state under these circumstances they became constructive trustees for the benefit of the owner of the property in the court, and subject to the control of the court of right to said property as full as when they held under it as tenants. This trust remained

throughout attached to Jno. McLaughlin, and falls upon his widow, heirs, devisees, or any holding under him in privity of blood or otherwise, save purchasers for valuable consideration without notice \* \* \* The validity of the forfeiture and the sale from the Auditor is not important and should not therefore be cancelled. The deed may stand good to divest the property from the state if she had any by the forfeiture; and to vest it in the devisee of McLaughlin, and his widow, who claims legal title to a portion; all to hold as trustee for the purpose of this suit."

The same doctrine is supported by the same court in *Pickett vs. Ferguson*, 45 Ark. 177, in the following language:

"He (the tenant) cannot use his possession as a basis to acquire title as an actual settler and thereupon found a claim hostile to his landlord, and any title which he obtains in his name by means of his personal residence, he holds for the benefit of his landlord."

It will be observed that the statute under which the tenant McLaughlin acquired title from the State, under a literal construction conferred upon him a right to purchase the land and but for the fiduciary relation as tenant which he bore to his landlord and the resulting constructive trust, his title would have been absolute. His position was as much within the letter of the law as the plaintiff and his predecessors in estate in the case at bar. The one conferred the right upon the "actual settler," the other upon the "owner of the improvements." If the one is in law the trustee for his landlord, what better position does the other occupy?

It will be observed from the above quotation from *Pomeroy* that that the purchaser in possession not having paid the purchase price occupies a relation of trust.

85 The Supreme Court of Arizona, in 1905, had before it such a question in the case of *Butterfield vs. Nogalez Copper Company et al.*, reported in 80th Pac. Rep. 345. In that case the plaintiffs had located mining claims in Mexico and sold a portion of their interest therein to one of the defendants for \$15,000.00 of which but \$500.00 were paid, the remainder being due in one year. The purchasers went into possession by reason of their purchase, and the plaintiffs not having procured any title to their lands from the Government of Mexico, but only taken the initiative steps, the defendants afterwards by removing the monuments designating the limits of such claims, procured a title for a part of the lands from the Mexican Government. They asserted it belonged to them, and the plaintiffs insisted that the title was held in trust for their benefit and in disposing of the matter, the court said:

"Whether or not the defendants, having obtained possession of the plaintiffs' property under the agreement to purchase, were in such relation to the plaintiffs that they could not acquire any adverse title and hold the property thereafter as against plaintiffs by virtue of such adverse title, we are clearly of the opinion that they could not, by any act of actual fraud, made possible by reason of the possession thus obtained, obtain title and hold the same adversely to plaintiffs. The facts stated in the complaint make out a case of grossest fraud and misconduct on the

part of the defendants alleged to have come into possession of the property under agreement \* \* \* To permit them to enjoy the fruits of their misconduct would be shocking to equity and good conscience. In such cases equity can and does afford relief. 'In general whenever the legal title to property, real or personal, has been obtained through actual fraud, malicious or other undue influence, duress, taking advantage of one's weakness or necessity or through any other similar means, or through any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same.'

The same doctrine was applied to tenants in common, where one of the co-tenants in possession of the property acquired all the title for himself in the case of *Hunt vs. Patchin*, 35 Fed. 816; where the court said:

"Under this state of the facts I am clearly of the opinion that a trust rises in favor of complainant under the operation of  
387 law. Defendant before and up to the re-location was in a position of trust in this particular and bound to protect their interest. It was his duty not to permit a forfeiture for the purpose of relocation, and acquired the whole for himself without their knowledge or consent. By his act and this breach of faith he threw his associates off their guard, and prevented them from taking other means to protect their interest.

The civil code of California embodies the rule as it before existed, under the common law, in equity jurisdiction, and as now exists in Nevada without a code in the following language:

'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts, is, unless he has some other and better right thereto, a voluntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.'

Here was a fraud, for the complainant, who resided nearly a thousand miles away, was induced, by the defendant's action, to believe that the claims would be forfeited and relocated, for the benefit of all, and by these means the defendant in violation of this faith, relocated, or he claims to have done so, for his own benefit alone. He stood in a confidential relation to complainant,  
388 he being an associate owner, entrusted with the management of the property. His duty was certainly to deal fairly with his associates. In my judgment, there was fraud as also a violation of trust. If not, the defendants surely got the title to these claims by "other wrongful acts." The acts were not rightful and if not they must have been wrongful. \* \* \*

Can it be doubted on the facts, as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and James in the property in question, through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interest."

Again in *Larkin vs. Siera Butte Gold Mining Company* 25 Fed.



337; where defendant by misrepresentation to the land department secured patent to a portion of a mining claim, insisting that plaintiff's predecessors had abandoned it, the court said:

"It is said, also, that the claim was forfeited by those parties not working it annually, as required by the statute. That is a matter I take it, in this case, of not the slightest concern. There was no evidence that the Mammoth Company took up the claim on the ground that it had been forfeited or any other, and until some one did enter, the complainant, under the provision of the statute itself, could not reenter and resume work at any time before other rights attached in favor of subsequent locaters. At all events, these parties had no title acquired in that way. \* \* \*

It seems to me clear that the complainant had a sufficient cause against the defendant for the enforcement of a constructive trust unless the respondent satisfactorily established one of its affirmative defenses? The civil code, section 2224, declares that 'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he had some other and better right thereto, a voluntary trustee of the thing gained for the benefit of the person who would otherwise have had it.' Where one party wrongfully obtains the legal title to land which in equity and good conscience belong to another, whether he acts in good faith or otherwise, he will be adjudged in equity as a constructive trustee of the equitable owner.

In further support of this doctrine of constructive trust, I find the following: *Suessenbach, et al. vs. First National Bank*, 41 Northwestern Rep. 662; *Ricks vs. Reed*, 19 Cal. 551; *Salmon vs. Symonds*, 30 Cal. 301; *Wilson vs. Castro*, 31 Cal. 420; *Lanman vs. Drachoss*, 4 N. W. Rep. 956 *Angle vs. Chicago Ry. Co.*, 151 United States 1.

390 But it is argued that Congress of the United States had authority to donate lands to whatever parties it saw fit, and impose such conditions upon the proposed purchasers as it might deem best, and this is conceded. It was so held by the court in *Angle vs. Chi. Ry. Co.*, supra, but at the same time the court held that the fact that the lands were granted to a certain party was no answer to the claims of another that such party took them as a constructive trustee. In discussing the matter, the Court said:

"As the court will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself. It may be presumed to have left to the courts the redressing of the private wrong done by the Omaha Co. \* \* \* of the disabled condition of the Portage Co. has been brought about by the wrong of the Omaha Co., the courts are open and the accepted maxim in those tribunals is, that where there is a wrong there is a remedy. It thus subverted the interests of the public and leaves the redressing of the wrong to that department which has not only the requisite jurisdiction, but also the machinery for as-

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certaining the amount of the injury and enforcing due compensation. \* \* \* The legislature may proceed with regard in all its action to the public interests, with the assurance that all questions of wrong and loss by the individuals will be settled in the judicial department, and that its own action in subserviency to the public interest, will bar no redress of a private wrong unless such bar be necessary to the accomplishment of the public interests. \* \* \* But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Company to the satisfaction of the judgment against the Portage Company, is, pro tanto, to nullify the action of the legislature, that in taking the land away from the one company and giving it to the other it intended that the transfer should be absolute without limitation and subject to no contingency of burdens. But it affirmatively expressed no such intention, it simply made the transfer leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. Suppose at the time of this transfer from one company to the State, and from the State to the other company, there was existing a judgment in favor of the Portage Company against the Omaha Company would it be for a moment contended that there was anything in the transfer which prevented the Portage Co. from satisfying its judgment by a seizure and sale of the lands thus transferred to the Omaha Company? Unless there were in the words of the Grant to the Omaha Co. something which expressly tied up the land it passed to that company subject to seizure and sale in satisfaction of any of its past or future obligations."

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Application of these principles to the case at bar clarifies the matter. When it is understood that Congress in negotiating the treaty in question, provided that the owner of the improvements may purchase the lot, did not intend to divest the private rights of the individual, but to leave the determination of such matters to the courts of the country, there is nothing left upon which the plaintiffs can predicate a right to the property as against the defendants. Under the letter of the law, the property was scheduled to the plaintiffs, but it is the duty of the court to declare them constructive trustees for the rightful and beneficial owner, if any there be. They were the tenants of the defendant's predecessors in estate, occupying under all the authorities a trust relation as to this property, and when they purchased it under the circumstances they did, they became and are trustees for the benefit of the defendants. It is a rule supported by the supreme court of the United States that whenever one party acquires the title to lands which in justice belong to another under a misapprehension by the land department of the government of the law that such parties held the legal title in trust for the beneficial owner.

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This rule can work no hardship on the plaintiffs. They have never purchased the possessory right to the lot as distinct from the improvements of the landlord or his successors in interest under whom the entry as tenant was originally made. When the plaintiff's predecessor in estate took possession of the lot in question, it was under the agreement that, while the improvements remained

his, he would surrender possession of the lot to his landlord on demand. This he refused to do, and wrongfully retained possession and, while it may be admitted that Fitzpatrick had no title to the lot, that fact furnishes no excuse for the tenant's action. He owed the duty to the landlord to surrender though the act in question had awarded the owner of the improvements on the lot the right to purchase it. This was adjudicated in the case of *Ellis vs. Fitzpatrick*, 64th S. W. 576, Id. 124, Fed. Rep. 430; *Frear vs. Washington*, 135 Fed. 280 and *Kemp vs. Jennings*, 64 S. W. 616.

In what search I have been able to make, I have found no case and counsel for the plaintiffs have cited none, holding that one wrongfully holding possession of public lands, as against some prior rightful possessor had prior right to purchase such land to 394 the exclusion of one against whom such wrongful possession is held whenever such lands have been offered for sale by the State or Government. Counsel for the defendants strenuously insist that a trespasser or tenant wrongfully holding over, was never to be accorded the prior right to purchase town lots in this nation and that a wrongful possession thus acquired could not be made the foundation or basis of a claim of such right. This contention is the foundation for the doctrine of constructive trusts. The Supreme Court of the United States, through a long list of cases, have held that Congress never meant to accord such rights to trespassers and tenants intruding upon the rightful possession of others *Gibbons vs. Recontr*, 111 United States 276; *Goode vs. Gains*, 145 United States, 141; *Atherton vs. Fowler*, 95 United States 513; *Trenough vs. San Francisco*, 100 United States 251; *Land vs. Davenport*, 85 United States 761.

In this case it is contended on the one hand, that Congress by the legislation in question, meant to give the prior right to purchase an improved lot to the owner of the improvements thereon and that thereafter such lot was the absolute property of the owner of such improvements, held by him, discharged of any and all trusts and obligations formerly arising or existing with respect thereto, while on the other hand, it is contended that Congress meant to accord the prior right to purchase such lot to the landlord and not 395 to the tenant; or if not to the landlord then to the tenant who held it thereafter as a constructive trustee for the landlord.

It is really immaterial to whom the land department awarded the prior right to purchase, if in the event it be awarded to the tenant, he held the same as such trustee for the benefit of the landlord. This was the point involved in both the cases of *Angel vs. Chi. Ry Co.* and *Ferguson vs. McLaughlin*, *supra*, and the court held in each of them in favor of the parties who occupied the positions of plaintiffs herein, that if they secured the title it was as trustees. It was said in the former of these cases that it is not to be presumed that the legislature in conveying the property to a trustee intended to relieve him of his fiduciary obligations, unless such intention affirmatively appears. There is no room for contention in the case at bar that Congress intended to grant the lot in question to the tenant if to the tenant at all, discharged of the trusts arising by reason of his relations and actions towards the defendants and if

he acquired title by reason of being within the letter of the law, holds as trustee for his landlord. The defendants assign as error of law the action of the Department in the following: "Second. The Department erred as a matter of law in holding that the said J. P. Ellis, prior to the sale and transfer to the plaintiffs had not forfeited his ownership of any improvements which he or his grantor may have placed on the said lot by his denial of the landlord's title to the property, both before suit was brought against him by Fitzpatrick and pending said suit."

I have carefully examined the record before the Department and, while I do not believe the conclusion finally arrived at by the Department with respect to the waiver of the forfeiture is sustained by the evidence, I find under the authorities that the question of waiver is a mixed question of law and fact. It particularly involves an intent, and as the question of intent is to be determined from the party's action, surrounding circumstances, as well as the evidence, which is necessarily of a negative character, I do not believe the court has authority to review the department's action on this question. The only evidence barring the complaint in the unlawful detainer action, on this question of waiver is wholly negative and to the effect that Theodore Fitzpatrick never had claimed the improvements but that his successors in estate Bourland and Cross laid claim to them in the early part of 1903. This evidence possesses but little, if any, probative value, nor do I believe that the waiver may be legitimately inferred from the pleading referred to in view of the fact that at that time the department had not indicated what character of improvements would be required to bring the lot within the pale of the provisions of the treaty authorizing the purchase of it as an improved lot. It may be noted, too, that in suing for the recovery of the lot, the plaintiff in that action necessarily sought the recovery of the possession of the improvements thereon, in the absence of disclaimer to that effect.

In *Potter vs. Hall*, 189, U. S. 292, the Supreme Court held that the final conclusion of the Department that an entryman acquired no substantial advantage over others taking a part in the race for lands opened in Oklahoma in 1889, because of his prior entry thereon during the day, the start was made, involved but the finding of ultimate fact, and not a conclusion of law, and that the question was therefore not reviewable by the courts.

"In *Lee vs. Johnson*, 116 U. S. 48, the court said: 'If, however, those officers, (referring to the officers of the Interior Department) mistake the law applicable to the facts, or misconstrue the statute and issue patent to one not entitled to it, the party wronged can resort to the court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee when the alleged reason relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony.'"

In *Schuler vs. Broughton*, 11 Pac. 716, the court said:

"Whether it (referring to the settlement of an entryman) was made in good faith or not was a question of fact, or at any rate, a mixed question of law and fact, and the decision of the department upon it was final."

In the case of *Quimby vs. Conlan*, 104 U. S. 430, the court said:

"The ruling upon a matter of fact or upon mixed questions of law and fact which were properly cognizable by the land department and passed upon by it will be beyond the interference of the Courts."

Under these principles, the correctness of which are not questioned by the defendants, it would seem that the finding of the officers of the department on the controverted questions of fact properly before them for their consideration, are conclusive on the courts.

The construction of the pleading is not a question of fact, but one of law, and if the alleged waiver in this case depended upon the construction of the complaint in the unlawful detainer action alone, the conclusions of the officers of the department thereon

would be reviewable by the courts, but there was other evidence in the record on this question which it is claimed

taken in connection with said complaint warrants the conclusions of the department. A mixed question of law and fact may become a question of law where the facts are undisputed and where all reasonable men would draw the same conclusion from such facts or where the question depended upon the construction of the pleading. I might be inclined to the opinion that this was such a case, were it not for the fact that all the officers of the department who have had occasion to investigate this record have come to a conclusion at variance with the one I entertain. This of itself puts the question without the pale of the court's authority.

The plaintiff in this action contends that the defendants are estopped, by a matter of record, from maintaining this action, and the matter of alleged estoppel is a judgment on demurrer *is* a cause brought in the United States Court at Chickasha, Indian Territory, in the year of 1902 by R. M. Bourland, and J. E. Cross against D. H. Johnson, the plaintiff herein, Riddle and Cook, and others. It was sought in that suit to restrain the tribal authorities from delivering and the parties plaintiff herein from receiving patent to said lot, and incidentally, it was prayed a receiver be appointed to take charge of said lot. The ground- of demurrer were lack of equity and that the complaint did not state a cause of action. It does not appear from the record upon which ground the demurrer was sustained, nor in the state of the record is it material.

After an order sustaining a demurrer with leave to amend and at the subsequent term of the court the plaintiffs in said action voluntarily dismissed the same as evidenced by the following order:

"Now at this time came on to be heard the above entitled cause, and the plaintiff- appearing in person and by attorneys and the defendant for the following reasons: First. There was no final judgment and by attorneys and after issues being joined herein, the

plaintiffs in open court announce that they would not further prosecute said suit, and desire the same dismissed. It is therefore considered and adjudged by the court that said petition in equity be and the same is hereby dismissed at plaintiffs' costs, and defendant have their costs herein expended, for all of which let execution issue."

It will be observed that the order of the court was not upon the demurrer, but upon the motion of the plaintiff to dismiss. This judgment cannot work an estoppel in this cause as against the defendant for the following reasons: First. There was no final judgment on the demurrer but the order sustaining the demurrer granted leave to amend, "Where the court has announced a decision sustaining a demurrer, which in effect defeats the plaintiff's

401 action, and the entry of demurrer sustained has been made on the docket, but has not been followed by formal judgment for the defendant, the plaintiff may dismiss or discontinue his suit, and bring another suit on the same cause of action." Black on Judgment, sec. 707.

"If the court in the former case had entered judgment on the demurrer, the parties could have appealed, and had the question reviewed. Instead of asking judgment be entered against them that they might appeal, they discontinued their suit, that they might further consider their cause of action, and determine if they would renew their suit, and we do not see how they are concluded by what took place in the former case, which never went to judgment other than nonsuit." State vs. Staylor, 17 Atl. Rep. 392. (Md.)

"But the question for our consideration is whether or not an interlocutory judgment sustaining a demurrer to a petition, and granting leave to amend, and the subsequent dismissal by the plaintiff, are to be treated as such a definite determination of the controversy upon the merits and will estop the plaintiff from asserting the same cause of action in a new trial. We are of the opinion that the question should be answered in the negative. When a demurrer to a petition is sustained, and the plaintiff declines to amend,

402 he practically confesses that he has alleged in his pleading every fact which he is prepared to prove in support of his action. Therefore in such a case nothing remains to be done except to render judgment for the defendant. \* \* \* But when he takes leave to amend, he virtually asserts that he had not set up his whole case, in his petition, and although the judgment is that his petition does not show a cause of action, yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus 'sets the matter at large.' \* \* \* If while the case is left open by the leave granted the plaintiff with the permission of the court, voluntarily dismisses his suit, in our opinion the judgment sustaining the demurrer ought not to be held conclusive upon him. 'A judgment to have the authority or even the name of *res judicata* must be a definite judgment of condemnation or dismissal." Freeman on Judgment, sec. 251, quoting Pothier on Obligations. By dismissal as here used we

understand not a mere non suit or discontinuance by the plaintiff but a dismissal by the court upon the merits of the action. Sheriff vs. Mo. Pac. Ry. Co. 17 S. W. Rep. 39 (Tex.).

403 "There was no longer any record or adjudication in that action which bound any one (referring to a non-suit after judgment). By the discontinuance of an action the further proceedings in the action are arrested, not only, but what has been done herein is also annulled; so that the action is as if it never had been. If a suit be dismissed at any stage, or the judgment rendered therein be set aside, vacated or reversed; then the adjudication therein concludes no one, and it is not an estoppel or bar in any sense." *Loeb vs. Willis* 3 N. E. 177 (N. Y.).

The following cases also sustain this doctrine:

*Sivers vs. Sivers*, 32 Pac. 571 (Cal.)

*Gallup vs. Lichter*, 35 Pac. 985 (Col.).

*Harrison vs. Hartford Fire Ins. Co.* 80 N. W. 309 (Iowa).

In the same section the author just quoted says that the causes of action are said to be the same when same evidence would support both actions but that if the testimony offered in the second suit is sufficient to authorize a recovery, but could have produced a different result in the first suit, there is no estoppel. By an application of these principles it is apparent that the causes of action were not the same and the evidence necessary to support the causes of action in the cases are different. In the one the primary object of the suit was to prevent the defendants in that action from obtaining the legal title to the property in litigation, while in this

404 suit the object is to charge him as a trustee of the legal title for the benefit of these defendants.

In *O'Conner vs. Irvine*, 16 Pac. 236, the Supreme Court of California, in discussing this subject, said:

"An action of ejectment and an action to declare a trust are essentially different. To prevail in the former the plaintiff must, as against the defendant be the holder of the legal title, whether such legal title be evidence by a *derainment* from the paramount source of title, or simply from prior possession; but in the latter the whole case depends upon the theory that the legal title is in the defendant."

"But it is equally well settled that if the plaintiff fails on demurrer in his first action for the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit, is no bar to the second, although the respective action were instituted to enforce the same right, for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action." \* \* \* But on the other hand, where the declaration in the second suit, by reason of new averments is not objectionable to the demurrer in the first, the issue is changed and the latter suit is not barred."

*Block on Judgments*, Sec. 707.

405 I am of the opinion that the allegation of legal title in plaintiff and the beneficial ownership in the defendants, both



being new allegations, are sufficient to bring suit within the rule above laid down. This doctrine is sustained by the following cases:

Gould vs. Evansville Ry. Co. 91 U. S. 526 (23 L. ed. 416).

Bissel vs. Spring Valley Ty. 124 U. S. 224 (L. ed. 31, 411).

Wiggins Ferry Co. vs. Ohio & Miss. Ry. Co. 142 U. S. 396.

The plaintiff insists that the defendants are seeking in this equitable action to enforce a forfeiture and that unless this court enforces a forfeiture the defendants cannot have judgment, that a court of equity will not enforce a forfeiture. Under the view I take of this matter, the question of equity enforcing a forfeiture becomes immaterial, and I do not deem a decision of that question at all required to a correct disposition of the cause.

### *Finding of Facts.*

I find the following facts:

Sometime in the year of 1892, Theodore Barnhart, a citizen of the United States, rented the lot in controversy of Theodore Fitzpatrick, a citizen of the United States, and that the lot was, at that time, vacant and unimproved; that Barnhart thereafter went into possession of said lot under said contract and placed a building thereon, that some time in September 1897, Barnhart sold the improvements to J. P. Ellis who went into possession and made some additional improvements and became the tenant of Fitzpatrick; that on July 7th, 1898, Fitzpatrick filed an action of unlawful detainer for the recovery of the possession of said lot in the United States Court for the Southern District of the Indian Territory at Chickasha making the said Ellis defendant therein alleging the expiration of the term of the rental contract on account of the refusal of the said Ellis to pay rent; that said Ellis thereafter filed his answer in said cause denying the relation of landlord and tenant and his unlawful holding of the possession of said lot and alleging ownership of the improvements on said lot in himself, I find that this action was tried on the 20th day of October, 1900, when Fitzpatrick had judgment against the defendant for the recovery of the possession of said lot and damages; that thereafter the defendant Ellis, appealed from the judgment in said cause to the United States Court of Appeals for the Indian Territory, and to the United States Circuit Court of Appeals for the Eighth Circuit where the judgment of the trial court was finally affirmed on October 22nd, 1902; that during said appeals the defendant Ellis, executed supersedeas bonds staying the enforcement of said judgment and retained possession of said lot in controversy during said time. That by reason of said possession being so retained by the defendant, Ellis, in said cause, Fitzpatrick and his successors in estate were wrongfully deprived of an opportunity to improve the said lot. I find that in 1902 and while the unlawful detainer action was pending on appeal the Chickasaw Townsite Commission scheduled the said lot to F. E. Riddle and Matt Cook, who I find, were the successors in interest

to J. P. Ellis, they having purchased, immediately preceding that time, whatever rights the said Ellis had to said property, and I find that the prior right to purchase said lot was awarded to the said Riddle and Cook by the Interior Department. I find that in June, 1902, the said Riddle and Cook paid to the United States Indian Agent \$375.00, the amount required under the Treaty to be paid in the purchase of said lot, that the value of the improvements on the property when Bourland and Cross were placed in possession of the lot in January, 1903, was \$150.00. I further find that on the 8th day of April, 1899, during the pendency of the unlawful detainer suit said Fitzpatrick and his wife conveyed all their right, title and interest in and to the lot in controversy to Ella Cross, who thereafter on the 18th day of September, 1900, joined by her husband, J. E. Cross, conveyed an undivided one-half interest in said lot to R. M. Bourland and that R. M. Bourland joined by his wife and Ella Cross joined by her husband, J. E. Cross, on May 25th, 1903, conveyed the entire lot to the defendants, E. B. Johnson and H. B. Johnson. It does not appear what was the value of the lot in controversy at the time the same was scheduled to the plaintiffs, F. E. Riddle, and Matt Cook. But it appears from the

408 evidence that when the present defendants purchased it something over a year later that they gave five thousand dollars for it. The plaintiff, Riddle, was the attorney for the defendant, Ellis, in the unlawful detainer action and necessarily purchased with notice of the facts with respect to the conditions of the title which he was purchasing. He knew that Ellis occupied the position of a tenant of the party Fitzpatrick and his successors in estate and he and Cook predicated their rights to purchase the lot of the tribal authorities upon their ownership of the improvements. Pending this suit, the plaintiff, F. E. Riddle, has acquired the interest of the plaintiff, Matt Cook. There was a contest between E. B. Johnson and H. B. Johnson as contestants and F. E. Riddle and Matt Cook as contestees, over the right to purchase said lot before the United States Indian Inspector, Commissioner of Indian Affairs and the Secretary of the Interior, where such right was awarded to the contestees, plaintiffs herein. Afterward in May, 1907, a patent was issued conveying the interest of the Indian Tribes in said lot to the said Riddle and Cook.

The parties agreed before me that a sufficient tender had been made by defendants herein to cover the purchase price of said lot, \$375. and interest, thereon.

### *Conclusions of Law.*

In my opinion the Department erred in holding as a matter of law that Fitzpatrick's right in the lot in controversy were extinguished by operation of law on June, 28th, 1898, as he owned no improvements thereon at that time, and in holding that the tenancy of Ellis thereupon ceased and that the said Ellis had an indefeasible right in law to purchase said lot. In my view of the law, said Act did not effect the rights of either of the parties so far as their con-

tractual relations were concerned. The Department erred in holding that the controlling questions under said Act of June 28th, 1898, and subsequent legislation were, "were there permanent, valuable and substantial improvements on the lot, and if so who owned them." The Department should have taken into consideration the facts that such improvements in this case belonged to a tenant and the tenant by a course of wrong conduct in excluding the landlord deprived such landlord of the opportunity to improve the lot. In my opinion, under such circumstances, the Department should have awarded the right to purchase to the landlord and not to the tenant and in this case to E. B. Johnson and H. B. Johnson.

The Department erred in not holding that the judgment in the unlawful detainer action established conclusively the fact  
410 that at the time of the institution of such suit the tenant, Ellis' term had expired and this his possession of the lot thereafter was wrongful, and that the tenant, while in such wrongful possession, could not predicate a superior right arising by reason of such possession to purchase such lot over his landlord, who, by such wrongful possession had been deprived of the opportunity of improving said lot.

I further conclude as a matter of law that if the Department was correct in its holding that the only question before it was whether said lot was improved and if so who was the owner of the improvements, and after deciding this question in favor of the plaintiff, F. E. Riddle and Mat Cook, awarded them the prior right to purchase it, yet under the circumstances in this case, they are constructive trustees holding the legal title to said lot for the benefit of the equitable owner, their landlord or his successors in estate E. B. Johnson and H. B. Johnson.

The plaintiff having expended on the 19th day of June 1902, the sum of \$375.00 in extinguishing the Indian title to said lot, and having succeeded to the title to the improvements on said lot, which were of the value of \$150.00 of which he was deprived of possession in January, 1903, should be required to convey said lot to the defendants, upon the payment of said sums with six per cent. per annum from the date of such payments.

Respectfully submitted,

J. T. BLANTON,  
*Special Master.*

411 And endorsed upon the back of said Special Master's Report appear the following endorsements of file-marks: Filed Oct. 26, 1907, C. M. Campbell, Clerk, J. W. Speake, Deputy. Filed, Mar. 6, 1909, C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

412 And afterwards, to wit, on the 26th day of October, 1907, plaintiffs filed in said court their Motion for judgment upon the pleadings and report of the Special Master, which said motion is in the words and figures following, to wit:

*Motion for Judgment Upon Pleadings and Report of Master.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Come now the plaintiffs in the above entitled cause and file this their motion for a judgment upon the pleadings and report of the Special Master filed herein, and for such motion allege:

First. That it appears from the findings of the Special Master, as shown by said report, upon mixed questions of law and fact, and from his conclusions of law, that plaintiffs were the owners of the improvements situated upon said lot in question, and that they based their preference right to purchase said lot from the Government by reason of their ownership of the improvements.

Second. That it appears from said report and the conclusions of said Master that the decision of the land department upon mixed questions of law and fact are conclusive and binding upon the court, and it further appears from said report and undisputed record that all the material questions in said case decided by the land department are mixed questions of law and fact.

Third. It is admitted and alleged in the cross-petition of said defendants that the owners of the improvements which were situated upon said lot at the date of the sale by the Townsite Commission, had the preference right under the law to purchase said lot.

Fourth. That by reason of said findings of the Special Master and by reason of said allegations in said cross-petition, under the law plaintiffs are entitled to a judgment in their favor in this cause.

Wherefore, plaintiffs pray that the court render a judgment in their favor, decreeing them to be the absolute equitable and legal owners of said property in controversy and that a jury be empanelled to assess the damages, and pray for such other relief as they may be entitled to in the premises.

W. A. LEDBETTER,

A. C. CRUCE,

F. M. BAILEY,

*Attorneys for Plaintiffs.*

And endorsed on the back of said motion appears the following file-mark: Filed Oct. 26, 1907, C. M. Campbell, Clerk, J. W. Speake, Deputy.

And afterwards, towit, on the same day, towit, the 26th day of October, 1907, plaintiffs filed in said court their motion to re-refer said cause to the special Master for further findings of law and fact, which said motion is in the words and figures following towit:

*Motion to Re-refer Cause to Master for Further Findings.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Come now the plaintiffs in the above entitled cause without waiving their rights under their motion filed herein for judgment upon the pleadings and report of the Special Master, but still insisting upon same, file their motion herein to have said cause re-referred to the Special Master for further findings, in order that he may make further findings of his conclusions of law and fact upon issues involved in said cause which he has wholly failed to incorporate in his former report, and for such motion allege:

First. That the Master has wholly failed to make any findings either of fact or his conclusions of law upon the amount of rents which have accrued and been collected by defendants, and  
415 as to the cost of the improvements now upon said lot erected by defendants, on question of taxes etc., upon said property; all of which were made issues in this cause.

Second. That under the pleadings in this case the defendants claim to have erected said improvements upon said lot bona fide and in good faith, and claim to have a right to be paid therefor, and said Master has wholly ignored said issues and failed to make any findings of fact in regard to same, or to set out his conclusions of law thereon.

Third. That said cause should be rereferred to said Master for the reason that said Master has undertaken to make additional findings of fact in addition to the conclusions reached upon the facts by the land department, and has attempted to substitute new findings of fact for the findings of fact and conclusions reached by the land department and has based his report and conclusions of law wholly upon an assumed state of facts and conclusions of facts based on matters outside of the conclusions of facts found by the land department.

Fourth. That it is material in this case that the Special Master should find as to the amount of rents accumulated and as to the value of said improvements and the expenses incident thereto, and as to whether or not they were erected and placed upon said lot bona fide and in good faith and made by the defendants believing that they were the owners of said property, for the reason that the  
416 issues are such in this case that should the highest court see proper to reverse said cause, the conclusion of facts having been reached by the land department and there being no controversy as to the facts in regard to the ownership of said property, but the same being wholly a question of law, it would be proper and the duty of the higher court to reverse and render a judgment in ac-

cordance with the opinion of said court, and for that reason it is material that the Special Master incorporate in his report his conclusion of facts and law upon these issues.

Fifth. That said report of the Special Master is contradictory, uncertain and unintelligent, and shows from the face of same that it was based upon an assumed statement of facts other than the conclusions of facts reached by the land department.

Wherefore plaintiffs pray that said case be re-referred to the Special Master and that he be required to make findings of fact and conclusions of law upon the additional issues herein, and make an additional report to this court in order that the whole matter may be properly adjudicated in rendering judgment, to the end that justice may be done all parties.

W. A. LEDBETTER,

A. C. CRUCE,

F. M. BAILEY,

*Attorneys for Plaintiffs.*

417 And endorsed upon the back of said motion to re-refer said cause to the Special Master for further findings, appears the following endorsement of file-marks. Filed Oct. 26, 1907, C. M. Campbell, Clerk, J. W. Speake, Deputy.

418 And afterwards, to-wit, on the 26th day of October, 1907, plaintiffs filed in said court their exceptions to the report of said Special Master, theretofore filed in said court, which said exceptions are in the words and figures following, to-wit:

*Exceptions to Report of Special Master.*

In the United States Court in and for the Southern District, Indian Territory, at Chickasha.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Come now the plaintiffs in the above entitled cause, and without waiving their rights under their motion for judgment upon the pleadings and report of the Special Master, and without waiving their rights under the motion to re-refer said cause to the Special Master, but still insisting upon all their rights under said motions, file their exceptions to the report of the Special Master subject to their rights under said motions, and for such exceptions allege:

First. That said Special Master erred in his report filed herein in its entirety, and plaintiffs except to the entire report for the reason the same is contrary to law as well as equity, contrary to the conclusions of fact reached by the land department and is based entirely upon an assumed case not within the pleadings of either

the judgment in the unlawful detainer action established conclusively the fact of the relation of landlord and tenant and that Ellis' term had expired and his possession of the lot thereafter was wrongful, and that the tenant while in such wrongful possession could not predicate his superior right arising by reason of such possession to purchase said lot over his landlord, who by such wrongful possession had been deprived of an opportunity to improve said lot, and plaintiffs except to said finding for the reason said finding is contrary to the finding of facts and conclusions reached by the land department, and for the further reason that it is wholly contradictory to the finding of facts of the Special Master wherein he holds that plaintiffs were granted the preference right to purchase said lot, not by virtue of being in wrongful possession of said lot, or wrongfully preventing the defendants from having possession of same, but on the ground that they were the owners of the improvements situated thereon, and said finding is also contrary to the pleadings in said case.

Eleventh. The Special Master erred in his conclusions of law that if the department was correct in its holding that the only question before it was whether said lot was improvements, and if so who was the owner of the improvements, and after deciding this  
424 question in favor of the plaintiffs, F. E. Riddle and Matt Cook, awarded them the preference right to purchase it, yet under the circumstances in this case they are constructive trustees holding the legal title to said lot for the benefit of the equitable owners, their landlord, or his successors in estate, E. B. Johnson and H. B. Johnson; and plaintiffs except to said finding for the reason the same, if it should be adopted by the court, would be expressly holding that the department decided correctly in favor of plaintiffs and committed no error under the law, yet in effect it would be holding that it decided wrongfully and contrary to law, and for the further reason such conclusion is contrary to law, contrary to equity and contrary to common sense, and is contradictory within itself, and would be in effect holding, after deciding that the land department had committed no error and decided correctly—yet it was just wrong anyway.

Twelfth. The Special Master erred in each and all of his conclusions of law reached, and plaintiffs hereby except to each and every conclusion of law as set out by the Master, for the reason they are contrary to the law, in conflict with and wholly ignore the finding of facts of the land department, and assume a different case from that tried before the land department.

Wherefore plaintiffs pray that said report of the Master be set aside and held for naught, and that the court render its decree herein based upon the conclusions of facts reached by the land department and in accordance with law and justice, and adjudge plaintiffs  
425 to be the legal as well as the equitable owners of said lot, and pray for such other relief as they may be entitled to in the premises.

W. A. LEDBETTER,  
A. C. CRUCE,  
F. M. BAILEY,  
*Attorneys for Plaintiffs.*



And endorsed on the back of said motion appears the following endorsement of file mark: Filed Oct. 26, 1907. C. M. Campbell, Clerk, J. W. Speake, Deputy.

426 And afterwards to wit, on the 6 day of March, 1909, by agreement of counsel and upon the order of the District Court of Grady County, State of Oklahoma, in which said court said cause was regularly set for hearing, and for the reason that the Judge of said court being of counsel in the case, was disqualified to sit and hear said cause, the same was transferred to the District Court of Carter County, State of Oklahoma.

And on the 6th day of March, 1909, a transcript of all the proceedings in said cause and all the original papers therein were filed in the office of the Clerk of the District Court of Carter County, State of Oklahoma, and all such papers and said transcript of proceedings, hereinbefore set out in this Case-Made, have endorsed upon their backs, in addition to the file marks of the Clerk of the United States Court in and for the Southern District of the Indian Territory, at Chickasha, the following: Filed March 6, 1909, C. T. Vernon, Clerk of District Court of Carter County, Oklahoma.

And said cause was docketed in said court and set down for trial upon the 10th day of March, 1909.

427 And afterwards, to wit, on the 6th day of March, 1909, plaintiffs filed in the District Court of Carter County, Oklahoma, their amended exceptions to the Master's Report, in the words and figures following, to wit:

*Amended Exceptions to Master's Report.*

In the District Court of Carter County, State of Oklahoma.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now comes the plaintiff, F. E. Riddle, and with the leave of court first had, amends the Exceptions herein filed to the report of the Special Master, so as to make the same read as follows:

1. He excepts to the Master's Report wherein he finds that under the Act of June the 28th, 1898, the landlord of town lots in the Chickasaw Nation had a right to purchase superior to that of his tenant who owned the improvements.

2. He excepts to that part of the report wherein it failed to hold that the owner of the improvements upon town lots in the Chickasaw Nation had the right to purchase the same superior to any right of the landlord, and regardless of the question whether the tenant was in or out of possession of such property.

3. He excepts to that part of the report which holds that be-

cause of some misconduct upon the part of the plaintiff in  
 428 refusing to deliver possession of the lot in controversy to  
 the defendants and his vendors, the plaintiff should be held  
 as a trustee holding the legal title to the property in controversy,  
 in trust for the defendants.

4. He excepts to that portion of the Master's report which holds  
 and recommends that the plaintiffs should be decreed to be a trustee  
 holding the legal title of the property in controversy for the benefit  
 of the defendants.

5. He excepts to the Master's report wherein it fails to hold that  
 the plaintiff is entitled to a judgment for the possession of the  
 property in controversy and wherein it fails to hold that the defend-  
 ants' cross complaint is without merit.

And upon these matters he asks the judgment of the court.

A. C. CRUCE,  
 W. A. LEDBETTER,  
 F. E. RIDDLE,

*Attys for Pltffs.*

And on the back of said amended exceptions to the Special Master's report appears the following endorsement: Filed Mar. 9, 1909, C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

429 And afterwards, to wit, on the 10th day of March, 1909,  
 said cause came on to be heard before the Honorable Still-  
 well H. Russell, Judge of the District Court of Carter County, State  
 of Oklahoma, by agreement of all the parties thereto by and through  
 their respective counsel, upon the motion of plaintiffs for Judgment  
 upon the Report of the Special Master, and upon the pleadings and  
 evidence in said cause, and upon the plaintiffs' Motion to set aside  
 the conclusions and recommendations of said Master, and the plain-  
 tiffs and said defendants being present by their counsel, the said  
 cause was heard, argued and submitted to the court and by the court  
 at said time taken under advisement.

430 And afterwards, to wit, on the 11th day of June, 1909,  
 said cause was by the court re-opened, by agreement of coun-  
 sel, for the further hearing of testimony upon the question of rents  
 and cost of improvements, and the following further proceedings  
 were had:

H. B. JOHNSON, called as a witness on the part of the plaintiff,  
 having been duly sworn, testified as follows:

Direct examination by Mr. CRUCE:

Q. Mr. Johnson, how long have you been in possession of this  
 property?

A. Something over five years.

Q. When did you first get possession?

A. It was in May, 1903.

Q. What has been the rental value of that property since you had it, Mr. Johnson?

The COURT: Now, do you wish to distinguish since he put the new building and what it was before?

Mr. CRUCE: I just asked him what had been the rental value—let him figure that out.

The COURT: Well, I think it would be fair to the witness to call his attention to the period.

A. We never got any rents from the old buildings—they were moved off. We bought the naked lot—the old improvements, they were moved off when we got possession of it.

Q. When did you move them off?

A. I think it was in May, 1903.

431 The COURT: He asked when you moved them?

A. I never moved them off. Mr. Rube Bourland moved them off in May, 1903.

Q. What is the rental value of the place since that time?

A. The total of rent values up to June 1st show that we have collected \$6486.00 rent.

Q. Since when?

A. Up to June 1st of this month, from the time we completed the building,—\$6486.00.

Q. 6486.00?

A. Yes sir.

Q. Well, now, how much have you been renting that property for per month?

A. Well, the store building up to the 1st day of March last rented for \$75.00 a month, and the rooms upstairs rented from \$18.00 down to as low as \$7.50, some of the inside rooms, per month. The two front rooms rented for \$15.00 per month steady, and part of the time some of the rooms were unoccupied, at other times they were all full—I think the building now is full.

Q. What does the whole building produce per month rent?

A. I can figure it out here in a minute—\$137 a month.

Q. That is what it is producing now?

A. That is what it would average if full all the time, it would bring about \$137 a month.

Q. What is it producing now?

432 A. The store building is renting now for \$100.00 per month—upstairs no change, those prices run right along.

Q. Then it would be how much?

A. Well, it would be \$137 and \$25 additional for the store—it would be \$162.00 a month.

Q. \$162 a month it is producing now?

A. If they are all occupied every month. Sometimes there is a room vacant, maybe a man moved out.

Q. Well, what would be the reasonable rental value of that property for the years since you have had it?

A. The reasonable rental value of it? Well, that is \$137.00 a

month, that is if it were all occupied, would be a reasonable rental value.

Q. When did you say you bought that property?

A. When did I buy it?

Q. Yes.

A. I am not positive of that, of the date, but then it was in 1903, along about in April or May.

Q. April or May. When did you say you erected your building on it?

A. We commenced immediately afterwards, erecting the building.

Q. Immediately afterwards?

A. Yes, as soon as Mr. Bourland could get the checks that were on it off, we commenced the building.

Cross-examination by Judge POTTER:

Q. Mr. Johnson, have you ever occupied this building any yourself, you or your brother, or have you always rented it all the time?

433 A. Always rented it.

Q. It has been used as a rental building?

A. Yes sir, a rental building.

Q. Has it cost you anything to keep it in condition to acquire that much rent on it?

A. Yes sir.

Q. What has been the cost of that?

A. The taxes on this property has been \$672.12 up to June 1st.

Q. I wasn't asking about taxes now. I will reach that later. You may go on with the statement—

A. The insurance was \$542.10.

Q. In all—altogether?

A. Yes, up to date.

Q. Altogether.

A. Paving taxes, that is special taxes for the paving in front of this lot, \$128.94, and then there is Janitor and other expenses—in this particular lot we struck some seep water which forced us to put in a pump that operates daily by the city pressure. That expense, prorated on that one lot there and in operating the heating plant and everything amounts to \$630.

Q. Does that include your janitor?

A. Yes, we prorated that.

Q. That includes your janitor?

A. Yes sir.

434 Q. You have to use a pump to keep this water—

A. To keep this dry. It is a kind of a spring in the basement.

Q. To keep the basement dry. It has cost you how much?

A. \$630.

Q. Up to this time?

A. Yes. And then we remodeled the front of the building when

we rented it to this man for \$100. a month, and the repairs inside cost \$450. That is the total expense on the building.

Q. Mr. Johnson, I believe your deed shows that you and E. B. Johnson bought this property from R. M. Bourland and Cross and wife in May, 1903?

A. Yes sir.

Q. How long had you known that property?

A. Well, I had known it since 1900. I erected a building adjoining it.

Q. Did you know that there was a suit pending for that property between Fitzpatrick and a man by the name of Ellis?

A. Yes sir.

Q. Had you been trying to buy the property before this suit was settled?

A. Well, we had negotiated some for it—we had figured some on it.

Q. Well, did you know when you bought from Bourland and Cross that that suit had been settled?

Mr. CRUCE: If the court please, we object.

The COURT: That is a conclusion of law—go on. I don't think it is the proper way to prove it, anyway.

435 Mr. CRUCE: My understanding is that all those questions have been settled.

The COURT: I don't want to hear any evidence that will conflict with the case as submitted before.

Judge POTTER: My only object is to show good faith.

The COURT: I thought that was the purport of the question; but the way you asked it—if he knew that it had been settled.

Mr. CRUCE: If the Court please, this suit was pending before this.

Judge POTTER: I think he has got a right to testify if he knew that that suit had been settled.

The COURT: Well, that is from his view-point, he might be able to say that, but it seems to me that is a matter to be adjudged hereafter.

Judge POTTER: I don't mean to try to prove by him that that settled the title, but as far as the good faith of the matter of improvements—that is what I am trying to get at.

The COURT: It at any rate becomes an interpretation of law. But let him state the facts and conditions under which he bought it, the facts existing at the time.

Mr. POTTER: I think—I take it if he bought it thinking he was getting good title, had reasonable grounds for thinking so, that he is entitled to—

The COURT: That he builds at no risk then—that if he betters a man's land in good faith thinking it is his, that he is entitled to pay for it?

436 Mr. CRUCE: It all depends on the facts which show the good faith. You are trying to prove by his opinion whether he had good title.

Judge POTTER: I am trying to prove by him, if you will let me, that he did think he was getting good title.

The COURT: Let him prove the facts, and we will judge of the other.

Judge POTTER: Are you excluding this evidence or not?

The COURT: They make an objection to the manner of the question. I suppose we don't want any evidence now that will go to the title of the property.

Judge POTTER: I don't offer it that way. I have explained to the court why I have offered it.

The COURT: Well, I think I will hear the proof from the witness, if he knew it was settled.

To the ruling and action of the court the plaintiff at the time duly excepted.

Q. At the time you purchased this land from Cross and Bourland, did you know that the original suit between Fitzpatrick and Ellis in reference to this lot had been settled?

A. Yes, I knew that they had a judgment from the Circuit Court of St. Louis, or the upper court, to the property.

Q. At the time you purchased it from Cross and Bourland, were they in possession of it?

A. They were in possession of it.

Q. Prior to the settlement of that suit had Ellis been in possession of it?

437 A. Yes sir.

Q. At the time you bought that lot, did you know that Mr. Riddle was claiming any title to it?

A. I knew that he was attorney for Ellis.

Q. Oh, yes, but that is not what I asked you. Did you know that Mr. Riddle himself, or Riddle and Cook, were claiming any title to this lot at the time you bought it?

A. No sir.

Q. Did you have any actual knowledge of a suit brought by Riddle and Cook against Cross and Bourland and their tenants for the land?

A. Not before I bought it, no.

Q. How long after you bought it before you had any actual

A. Well, the first term of the court after I bought it and commenced work on it, on the building, our attorneys, Bond & Melton, called me up from the court house——

Mr. CRUCE: Don't state that——

Judge POTTER: Needn't state what they said.

The COURT: If that was the first means of his knowledge, he may state where his first information came from without stating what they told him.

Q. You state that you learned that at the term of court after you bought?

A. Yes sir.

Q. Do you know whether or not it was the first term after you bought or not?

A. I wouldn't say for the first term, but the first time  
438 that case was called.

Q. You learned that how you say?

A. They told me.

Q. You needn't tell what they said. Who told you?

A. Bond and Melton, our attorneys.

Q. You learned that through them?

A. Yes sir.

Q. That this case was pending?

A. Yes sir.

Q. Had you then begun to improve the lot?

A. The building was nearly finished.

Q. The building was nearly finished?

A. Yes sir.

Q. Now, Mr. Johnson, is it a fact or not, that when you first learned of the existence of this suit that brick building was nearly finished?

A. Yes sir.

Q. Where does Mr. Riddle live?

A. He lives in Chickasha.

Q. Where was he officing at the time you built that building?

A. I really couldn't tell you just where he was officing—I don't know which building he was in at that time. After we completed the building, I rented him a suite of offices in another building.

Q. But you don't know where he moved his offices from to that—

A. No, sir; I really don't.

Q. While you were laying the foundation of this building  
439 or after you had begun it, did Mr. Riddle ever object to you doing that, or give you any notice not to do it?

A. No sir.

Q. Never said anything to you about it?

A. No sir.

Q. He is a practicing lawyer in Chickasha?

A. Yes sir.

Q. Is this building on one of the Main streets of Chickasha?

A. Yes sir, Chickasha Avenue.

Q. That is the main street of the town, isn't it?

A. Yes sir.

Q. This lot when you got it, what shape was it in?

A. It was a very low lot, at the back and the water stood there against our building, and Mr. Bourland had moved off two small buildings fronting Chickasha Avenue.

Q. Did you fill in that or not?

A. No, we built the basement right in that low swag, at the south end of the lot.

Q. Was this lot in the shape you got it from Cross & Bourland vacant at the time of any rental value as a vacant lot?

A. Why, it would rent, yes.



Q. What was its rental value as a vacant lot?

A. It would probably rent for \$25. or \$30. a month.

Q. Well, why does it now rent for \$137. a month.

A. The improvements that are on it, adjoining our building there, we have got a very good building adjoining it.

440 Redirect examination by Mr. CRUCE:

Q. Now, you say that you first got this property from who?

A. R. M. Bourland and James Cross.

Q. Bourland and Cross. You bought it in 1903?

A. Yes sir.

Q. April or May?

A. I think it was May—April or May—May, I think. The deed will show.

Q. At that time, had it been awarded to anyone by the townsite commission?

A. Had it been? I think not.

Q. Isn't it a fact that that property had been scheduled and paid for in 1902.—June 1902?

A. Well, I think—I learned afterwards that it had been listed and that the amount of the Government's price was sent in—it was my understanding when I bought it that the lot was listed in litigation.

Q. You say that at the time you bought it, you think your were informed of the fact that it had been——

A. Listed in litigation.

Q. Listed as being in litigation.

A. Yes.

Q. Yet you said a while ago, that when you bought it, your understanding was that that litigation had been settled?

A. Yes, all the litigation that I knew anything about.

Q. The litigation that you knew anything about?

A. Yes sir.

Q. Now, when was it that you—who was that fellow at Fort

441 Worth that you got to make some plans to build that building there and the bank—what was his name?

A. The architect that was building our building?

Q. The Fort Worth man that made you some plans.

A. Statts Sanguinette & Statts.

Q. Did anyone else ever make you any plans for that?

A. I don't remember of anyone.

Q. About when was it they made those plans do you remember?

A. Well, we were building our building there in 1901—the latter part of 1901.

Q. 1901. Your building. Did he make the plans for it?

A. He made the plans for it, yes.

Q. Then you acquired this lot afterwards, this lot that is in dispute?

A. We didn't build on that until we afterwards bought it—we never built on it until we bought it.

Q. That was in 1903 when you built on that lot?

A. Yes sir.

Q. Did you build on that lot any—you built your bank building, the other building, there in 1901?

A. 1901—completed in 1902.

Q. Were you the one that had these plans made?

A. Yes sir.

Q. Now, I will ask you, Mr. Johnson, if it isn't a fact that at the time you had these plans made to build this—When did you build on lot 2 or lot 3?

A. Lot 2 and 3? We built on Lots 1 and 2, and Lot 3 is the one in question.

442 Q. Didn't you first build the bank building?

A. Yes sir.

Q. Then didn't you afterwards build on lot 2?

A. Lot 3?

Q. Lot 3?

A. The bank building covers two lots.

Q. Didn't you afterwards build on lot 3?

A. Yes sir.

Q. Now, then, you had the building on lot- a and 2 built in 1902—lot- 1 and 2?

A. Yes sir.

Q. When was it you first thought about building on lot No. 3?

A. Well, I might have made some figures. Mr. Riddle—I remember now—I know now what you are driving at.

Q. Yes, just tell us about that.

A. Mr. Riddle came to us and wanted to know what it would cost if we would go in with him and his client and build a building on this lot in litigation.

Q. What client?

A. Ellis. He was in position to deal with us on this lot. My brother and myself figured on it some. I had the architect make a sketch of it, what it would cost, the kind of building, and this case was—the lot was in litigation at that time, but we never closed any deal at that time, and didn't do anything with it.

Q. But you afterwards went off and bought it from somebody else?

A. We bought it from Bourland afterwards.

443 Q. How long after that was it before you bought it from Bourland?

A. I think six months something like that.

Q. I will ask you if this is one of the plans that you had made on that building, at that time, on that lot? (Handing witness paper.)

Judge POTTER: Do you want to encumber the record with this?

The COURT: On lot 3, you mean?

Mr. POTTER: I suppose the fact you want to show is that he had purchased buying it from Ellis and—

A. These are the plans showing an estimate of the cost of a building on that lot.

Mr. POTTER: We will admit that.

A. At that time I went into a contract with Ellis and Bourland to buy a half interest in that wall that we built on lot 2.

Q. I will ask you if this is—

A. (Continuing:) We went into a contract to build this wall and pay my one half interest in the cost of the wall on lot 3—I placed my party wall on half of that lot—a party wall.

Q. I will ask you if you didn't have made on your plans here, "Additions Bank Building, First National Bank, Chickasha"?

A. New Store and Office Building for Mr. Riddle, Mr. Riddle, as I say was figuring on this.

Q. Didn't you have this made?

A. No sir.

444 Q. Who had that made? Didn't you have the architect make this?

A. No.

Q. Specifications?

A. The architect said he would make these for anybody—I never paid him for them.

Q. But you were at that time figuring on building a building there with Mr. Riddle?

A. Yes.

Q. And you afterwards bought from Cross & Bourland?

A. Cross & Bourland.

Q. Did Mr. Riddle inform you before you bought from Cross & Bourland that he had no interest, or that he had any interest at the time you were figuring with him about building the house?

A. He told me he could get an interest, that he was representing Ellis.

Q. Didn't he tell you what interest he had, that he had bought Ellis out and he didn't have any further interest in it?

A. He told me he was representing Ellis.

Q. Did he at any time after you figured on building this house with him, tell you, before you bought from Cross and this other fellow—tell you that he had lost his right there and didn't have any interest?

A. No sir.

Q. How did you get your idea that he didn't have any?

A. When the Court in St. Louis decided against him.

Q. When was that?

445 A. Along about the first of the year, that year.

Q. Now, Mr. Johnson—your name is H. B. Johnson?

A. Yes sir.

Q. Did you testify in the contest case between yourself and brother, as contestants and Mr. Riddle here and Mr. Cook, as contestees?

A. I expect I did.

Q. You were cross-examined in that case, by Mr. Ledbetter weren't you?

A. I think so.

Q. I will ask you to state whether or not upon that occasion you testified in answer to a question asked you by Mr. Ledbetter—this is

the question: "Mr. Johnson, Potter, Barefoot & Carmichael represented your interest in that lawsuit, didn't they."

Judge POTTER: We object to that—we have never examined him about that, and you are examining him by reading from another paper and haven't identified or submitted the paper to him.

Mr. CRUCE: I am asking him if he didn't testify to that on that trial. It is only one or two questions.

Q. If you didn't say there, "They took care of the case," and the next question was "And your ownership of this place is involved in that suit—the suit was brought before you became interested?" And didn't you answer, "Yes, sir."

A. I don't know what suit they refer to. I knew they represented Bourland and Cross. When I was called from the Court House by Bond & Melton, they said, you are interested in  
446 a suit pending over there and they said, get Judge Potter, because he knows all about the case.

Q. And if you didn't answer further, "Q. And since you became interested in that suit Potter, Barefoot & Carmichael have represented the interests that you bought in that suit?" And if you didn't answer, "Yes sir."

A. Yes sir.

Q. Did you answer that way?

A. I think I did.

Q. The next question: "That was the understanding that he was to continue to represent the suit at the time you bought it?" And your answer was, "Yes sir, they were to complete the proceedings they had started." What proceeding were you talking about them?

A. The Ellis and Fitzpatrick.

Q. You bought the place knowing the suit was pending?

A. At the time I bought the lot I thought it was settled—that the judgment was final." You answer that that way?

A. Yes sir.

Q. If you thought the matter was settled, how is it you understood they were to continue to represent the interests you bought out?" And your answer is, "Judge Potter came to me after I had bought the lot, at the next term of court, and said that Riddle had got back into Court for some reason and brought up another trial on this lot." You answered that way?

A. Yes, I think I suggested that to Judge Potter, I want you back in this case, Riddle is back in court again.

447 Q. Didn't you answer then: "Judge Potter came to me after I had bought the lot, at the next term of court, and said that Riddle had got back into court for some reason and brought up another trial on this lot"; is that the answer you made on that trial?

A. Well, I guess I did, if that is the record.

Q. Well, your recollection is—

A. I know I referred the matter to Judge Potter before the case was brought up.

The COURT: Mr. Johnson is one of the defendants in this isn't he?

A. Yes sir.

Recross-examination by Mr. POTTER:

Q. At the time you bought this land from Bourland and Cross, you know then that this suit brought by Riddle to recover the from them was pending?

A. No.

Mr. CRUCE: We object.

The COURT: Let him answer.

Q. Now, in your answer here, where you stated it was your understanding that Potter, Barefoot & Carmichael were to attend to the suit, did you mean that they were to attend to it upon the original employment by Bourland and Cross, or did you employ them and to attend to it for you?

Mr. CRUCE: If the court please, we object to that.

The COURT: It seems to me we are trenching on the record heretofore made in this case, in a great measure. Of course, since counsel for the plaintiff bro't out that matter and the witness was not permitted to explain it in the previous record, I think right he should explain it now, or at least give his meaning of what he had reference to. Answer the question. When you said you expected these men to continue as your lawyers, what did you mean by that?

A. I meant that if there was any further litigation in getting the patent to the lot, I expected Judge Potter, in as much as he had handled the case before, to look after it.

Q. Well, this record here explains it itself. There is one question they asked him here "Did you not state that you had an understanding with Bourland at the time you bought that Potter Barefoot & Carmichael were to continue—" "A. No understanding whatever." He explained that here and they didn't read it.

Q. Do you know, Mr. Johnson, whether or not, after Bourland and Cross sold out that I abandoned the case—that Potter Barefoot & Carmichael abandoned the case and had nothing further to do with it until—

A. Until I empl-yed you.

Mr. CRUCE: We object to that. It is immaterial, whether they abandoned it or not—they may have abandoned it—

The COURT: Well, that is simply along the line of the other inquiry. It is enough on that point.

A. At the time, Mr. Johnson, that you were figuring with Riddle and Ellis about building a building on this lot, or the lots adjoining in conjunction with them, was Ellis then in possession of this lot?

A. Yes sir.

Q. And claiming it?

A. Yes sir.

Q. Now, at the time you actually bought from Bourland and Cross, they were in possession?

A. Yes sir.

Witness excused.

F. E. RIDDLE, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct examination by Mr. CRUCE:

Mr. CRUCE: If the court please, Mr. Riddle is familiar with this case—I know absolutely nothing about it and if he will just go on—

Mr. POTTER: He may testify without question.

Mr. CRUCE: I was going to ask that permission.

Mr. POTTER: And if he goes too far I shall object.

A. It is pretty hard to testify without questions. But, myself and Matt Cook received a certificate from the Indian Agent for the appraisement of the lot in June, 1903. I talked with Mr. Johnson several times—about that, in regard to the title, and showed my title papers from the Government two or three times in the year 1902.

Q. You say you received the certificate in 1902 or 1903?

A. 1902. It was scheduled, I think, in probably March or April, and afterwards the commission came back and served notified, I think now, about the 1st of June 1902, and about the latter part of June, I received the final receipt from the Indian Agent at Muskogee. I remember showing it to Mr. Johnson on two or three different occasions, and we were negotiating with him about putting a building on the lot. Sometime during that year—just what time I don't remember, but at the time these plans were drawn, I know. And the understanding was, I was to furnish the lot and he was to furnish the money to build the building on and we would go in *halvers* on it, and after we had the plans drawn, he told me one day that Mr. Bourland was interested in the bank, I think, and I think his brother, had consulted about the matter and thought perhaps it might make Mr. Bourland angry with them and do some injury to his bank and they thought best not to go into the matter and the next thing I heard he had bought out Bourland and Cross.

Q. Bought out Bourland and Cross?

A. Yes sir.

Q. Was that the same Bourland that—

A. Yes sir. He said he was a director in the bank, and that probably it would make him angry or his influence would injure the bank and they preferred not to take that step.

Q. At the time you were figuring with him about building, he was to furnish the money and you to furnish the lot to put this building on, and at the time these plans were got, was there anything about Ellis's interest then?

A. I was to acquire Ellis' interest and he was to furnish the

money for the building and we were to go in *halvers* on  
451 the lot.

Q. Was that before or after the property had been scheduled to you?

A. Well, that was before—I think that was probably after the property had been scheduled, but before notice—about the time the property was scheduled to me—and they came back and served notice—I don't remember the exact time—sometime after the bank building had been started and was partially completed, they were building the bank building then, sometime in the winter of 1902, just how soon I wouldn't say, but I talked with him about it, tho after the property had been scheduled to me and I know I showed him the papers on one or two different occasions.

The COURT: Let me understand you. I understood the witness to say his talk with Johnson was after he had received the certificate, that he showed him the certificate, the certificate which he received some time after the scheduling?

Mr. CRUCE: It is a notice.

The COURT: I just want to know—it is a matter before the court.

Mr. POTTER: If he don't keep his testimony straight, I don't think it is our lookout.

A. I did show Mr. Johnson the certificate two or three different times and we talked about the lot two or three different times, but when we first had the plans done, I don't remember the exact date, but some time after he started his bank building—the building on  
lot No. 2—sometime during that winter—I don't remember  
452 when he built that—when he completed that—whether before or after the certificate was received, I don't know, but we were negotiating some two or three times about it, I know I talked with him after receiving my certificate and showed him the certificate, but whether that was the time the plans were drawn or before that, I wouldn't say—I don't remember the exact date the plans were drawn.

Cross-examination by Mr. POTTER:

— Mr. Riddle, is it a fact, as you stated a while ago, that in the negotiations between you and Johnson, that you were to acquire the Ellis title? Is that true?

A. I think that is when we first commenced negotiating yes.

Q. When you first began the negotiation, the understanding was that you were to acquire the other's title?

A. Yes.

Q. Now, did you ever talk about it once after you had the Ellis title?

A. Oh, I suppose, Mr. Potter I talked to Mr. Johnson about it. It hadn't been hardly a month from the time this property started in litigation until he acquired Bourland and Cross's interest.

Q. I will ask you if the reason that Mr. Johnson refused to go in that deal with you and Ellis was not because the lot was in litigation and the suit brought by Bourland and Cross still pending against it, and didn't assign that as a reason?



453 A. No sir, he did not. Of course, it was in litigation and he knew it all the time, but he didn't assign that to me as a reason.

Q. Now, didn't he tell you that he wanted to build on that lot, wanted to acquire that lot from whoever won it in that law suit?

A. No sir, he didn't say anything like that.

Q. Now, Mr. Riddle, didn't you and Ellis enter into an agreement with him and Bourland—a written agreement, that has been lost, none of you can find it, that the party who won that lot in that law suit was to have one half of the partition wall, of Johnson's wall, going into that building—and it was left over to determine after that suit was determined, who should have it?

A. No sir.

Mr. CRUCE: We object to that as not proper cross-examination, and for the further reason that testimony, if it is competent at all, should have been used upon the main issues in this case, as he was the owner of this property. And it does not in any way go to prove the rental value of this property.

The COURT: The first part of the objection is overruled, and as to the latter part, it is a matter inquired of Mr. Riddle himself, drawn out by the plaintiff, germane to that inquiry—how far it is material I don't know.

Q. Did you all enter into an agreement?

A. We entered into an agreement, but the condition of it was not as you have stated.

454 Q. What was the condition?

A. The condition was, whenever the lot was finally determined in that case, by the Interior Department, or whatever department it might be finally determined by—the ownership finally determined—the ownership of the lot——

Q. At that time you did——

Mr. CRUCE: Let him answer.

A. (Continuing:) Whenever the ownership of the lot was finally determined, whatever court or department it was decided in, why then——

Q. Now, Mr. Riddle——

A. (Continuing:) —then the party finally succeeding to the title to the lot was to pay for the half interest in that wall to Mr. Johnson.

Q. Is that all now?

A. I think that is all.

Q. Well, now, isn't it a fact that at the time you were negotiating, the only way the lot was in dispute, at the time you entered into that agreement, the only way the lot was in dispute at all, why, was by the suit of Fitzpatrick against Ellis then pending?

A. I rather think so, yes.

Q. And isn't it a fact——

A. I would modify that—the title was not in dispute at all in the pending suit and Johnson knew as well as anybody else that the suit was not to settle the title of the lot.

Q. It settled the right of possession to it, which settled every-  
thing? But I don't want to get into a dispute about that legal  
455 proposition. I will ask you if it wasn't a part of that agree-  
ment that whoever won that suit, Cross and Bourland, who  
had bought the Fitzpatrick interest, or Ellis, was to pay for that  
half of that lot

A. No sir, that was not the agreement.

Q. Half of that wall, I mean. You say that was not it?

A. No sir, because he knew——

Q. What became of that agreement?

A. I don't know, sir. Mr. Johnson, Ellis or somebody had a  
copy of it. I don't know whether Johnson has his copy of it or  
not.

Q. You have all searched for it and tried to find it?

A. I did. Mr. Bourland said he thought he had a copy of it—  
left it somewhere.

Q. He couldn't find it?

A. I don't think he did find it.

Q. Now, Mr. Riddle, you stated that you showed Mr. Johnson  
your papers, your certificate, two or three times. What was you  
showing it to him so much about?

A. Well, in the first place, Mr. Johnson—I was doing business  
there in the bank with him—and like anyone else the question would  
come up—I showed it to him several times—I talked to him about  
this lot, I suppose, 50 times altogether.

Q. And you always took this certificate along to show him.

A. No, not every time, I did show it two or three times.

Q. Wasn't once enough?

A. We were talking about building on it together, two or three  
different times, and I simply wanted to show him——

456 Q. Wasn't one time enough to show it to him?

A. Probably it was, but I remember showing it to him on  
two or three different occasions.

Witness excused.

The COURT: Gentlemen, it is understood here that all this testi-  
mony admitted by the court here on this hearing applies only to  
the questions of the rental value of the property and as to the good  
faith of the improvements?

Judge POTTER: Yes.

The COURT: That is the only object the testimony is introduced  
for and the only purpose of the court in admitting it.

Judge POTTER: Yes, we will let it appear so by the record, that  
that is the only purpose of it.

Here the plaintiff rested his case.

Whereupon the defendants offered and introduced evidence as  
follows, towit.

H. B. JOHNSON, recalled on the part of the defendants, testified further as follows:

Direct examination by Mr. POTTER:

Q. Mr. Johnson, when you were engaged in negotiating about building the building there in conjunction with Riddle and Ellis, there was a written agreement entered into between you all as to the party wall of the building that you already had up?

457 A. That agreement existed before.

Q. Sir?

A. I had that agreement when I started the first building, I was entering into negotiations with them—

Q. When you first built the wall. Who did you have that agreement with?

A. With Bourland and Ellis, with D. -ade Sayers representing Bourland and Ellis—Riddle representing Ellis.

Q. Do you know what became of that agreement?

A. My copy of it was afterwards lost, either in transit to Muskogee or in use afterwards in the contest case—I think that is where we lost it—forwarding the papers over to the Muskogee office.

Q. You think it was lost in forwarding the papers to the Muskogee office?

A. Yes sir.

Q. At any rate you haven't got it?

A. I haven't got it. Ellis had a copy of it.

Q. Do you recollect well enough to state what the contents of it were?

A. He was to pay me, \$550., as I remember the figures, for one half interest in the party wall.

Q. Who was to pay it?

A. The party who gained the suit that was then pending.

Q. The party who gained that suit?

A. Yes sir.

Q. Mr. Johnson, did you ever recollect Mr. Riddle showing you his certificate, showing that the lot had been awarded to him, the right to buy it?

458 A. I don't think he ever showed me a certificate. He showed me a receipt a good while after I bought the lot, showing that they had remitted \$375. up to Muskogee, for payment.

Q. That was after you bought the lot?

A. Oh, yes.

Q. Do you know whether or not that was before you began the building or afterwards?

A. It was after we began the building.

Q. Was it before or after you were notified of this suit—this present suit—of its existence?

A. It was after this suit.

Q. Was it after you were notified of it?

A. Oh, yes.

Witness excused.

Defendant read in evidence the deposition of D. L. Cowan, which said deposition, omitting notice, is in the words and figures following, towit:

In the District Court of Carter County, State of Oklahoma.

F. E. RIDDLE, Plaintiff,

vs.

W. D. BELL et al., Defendants.

The deposition of D. L. Cowan, to be read in the above entitled cause on the part of plaintiff, taken at the time and place specified and mentioned in the notice hereto attached:

D. L. COWAN, being produced as a witness by plaintiff and 459 being first duly sworn, as by law required, testified as follows:

(Before deposition of said D. L. Cowan was read, Mr. Cruce for the plaintiff made the following objection.

Mr. CRUCE: We object to the introduction of any testimony as to the value of any improvements he put on the lot.

The COURT: Why?

Mr. CRUCE: For the reason that he says himself that he bought that lot after this suit was brought, after he knew that the title was in dispute and he could not under the law put those improvements there in good faith.

The objection was by the court overruled, and to which ruling and action of the court the plaintiffd at the time duly excepted.)

Q. State your name?

A. D. L. Cowan.

Q. Where do you reside?

A. Chickasha, Oklahoma.

Q. What is your occupation?

A. Contractor and builder.

Q. Mr. Cowan, do you remember the building of a two story brick building on lot 3 block 46 in the town of Chickasha, Oklahoma?

A. Yes sir.

Q. State what you had to do with that building, if anything?

460 A. I had the contract for the brick work.

Q. I wish you would state if that two story building on lot three was built or erected under contract in connection with other buildings and if so state what other buildings?

A. It was built under contract with the building on lots four and five, adjoining it on the west.

Q. State the character of the building that was built on lots four and five in connection with the building on lot three?

A. They were all two story buildings.

Q. State whether or not they were the same length buildings?

A. They were all the same length, yes sir, with the exception of the building, on the last 25 foot lot, which had no basement under it.

Q. State whether or not, with that exception, they were all of the same size?

A. They were all of the same size.

Q. State to the Court what would be or was the difference in the cost of the three buildings, if any?

A. They- would be practically no difference in the cost of the three buildings.

Q. I wish you would please state the contract price for the three buildings, on the three lots described when completed?

A. The contract price was \$14800. and some odd dollars.

461 Q. State then what would be practically the cost of the building on lot 3 block 46?

A. Well, the cost would be practically \$5000.

Q. State whether or not that included steam heating, wiring and plumbing?

A. It included the wiring and plumbing, but not the steam heating.

Q. State whether or not, the steam heating was erected to supply all three of the buildings in question?

A. It was to supply all three buildings.

Q. Do you know about what the steam heating apparatus cost that was furnished to place in the building in question?

A. It would run between \$3000. and \$3500.

Q. State what extra cost that would be on lot 3 block 46?

A. I would judge it would be somewhere between \$1000. and \$1200.

Q. Then, as I understand you, the building on lot 3 block 46 completed, including heating, would be approximately \$6500. or \$7,000.

A. Yes sir, including the steam heating and architect's commission or percent for superintending the contract.

(Signed)

D. L. COWAN.

Subscribed and sworn to before me this 10th day of June, 1909.

MAMIE DEVLIN,

*Notary Public.*

My commission expires March 8th, 1910.

462 Said deposition of D. L. Cowan was endorsed on the back:  
Filed June 10, 1909, C. T. Vernon, Clerk District Court of  
Carter County, Oklahoma.

H. B. JOHNSON, recalled by plaintiff for further cross examination, testified further as follows:

Recross-examination by Mr. CRUCE:

Q. Mr. Riddle did show you this certificate, showing that the property had been scheduled to him?

A. He showed me a receipt for \$375.00.

Q. Do you remember writing a letter to the Indian Agent in July 1903, when you sent the check for \$280. and some odd dollars, and stating to them at that time that Mr. Riddle had got a receipt from them showing he had paid his money?

A. No sir.

Q. You wrote such a letter?

A. I sent the money, but I never mentioned anything about receipts in any way. I sent that money before that. Before I ever saw or ever knew he had received a certificate—I mean a receipt.

Q. What was that money for?

A. First payment on a lot.

Q. On what lot?

A. Lot 3.

Q. Did you make a first payment on lot 3?

463 A. I tendered the money.

Q. How much was it?

A. I think it was \$375. I sent that soon after I got title from Bourland and Cross—a week or two afterwards.

Q. Now, I will ask you if you didn't estimate it \$281.25, stating that that was a  $\frac{3}{4}$  payment on lot number 3, the one that is in contest here?

A. Three fourths?

Q. Yes. If that was not a three fourths payment, and if that letter was not written in July—July 31, 1903?

A. Well, I don't know as that was the estimate of it, but I think it was soon after I got title deed from Bourland and Cross I remitted them the full amount.

Q. Bourland and Cross hadn't made any payment up to that time?

A. No, the lot had been scheduled as in litigation.

Q. Well, had it been sold?

A. And we understood afterwards—I bought the lot before I ever knew Cook & Riddle got in the game and had it listed to them. So I tendered the money and sent my papers up there—I believe I had Judge Potter go up there, or someone, after we knew it was in a contest at Muskogee.

Redirect examination by Judge POTTER:

Q. Mr. Johnson, has the building of this house on this lot enhanced the value of the lot any?

A. Yes sir.

Q. To what extent has it enhanced its value?

A. I should say 75 per cent of its present value.

464 Q. Well, I mean, in dollars and cents, has it enhanced it to the extent of the value of the improvements, or the cost of the improvements, or not?

A. Yes.

The COURT: You proved on that subject before that putting the improvements there increased the rental value.

Judge POTTER: Yes, I had done that, but I hadn't proved it in-

creased the actual value. Of course, you have got to get at it inferentially.

Witness excused.

Here the defendants rested their case.

And here the plaintiffs and defendants each rested their case.

And the above and foregoing evidence set out in this case made was all the evidence offered and all the evidence introduced upon the trial of this cause.

465 And afterwards, to wit, on the 11th day of June, the Court rendered its decree in said cause. The following is the Journal Entry of the Decree rendered in said cause:

*Decree—Journal Entry.*

In the District Court of Carter County, Eighth Judicial District, State of Oklahoma.

No. 370.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Decree.*

Now on this the 11th day of June, 1909, being one of the regular days of the May, 1909, term of the District Court within and for the above named county, district and state, came on to be heard the above entitled cause, by agreement of parties, said cause having been submitted and argued to the court heretofore, and the court having had the same under advisement, which said hearing was on the motion of plaintiff for judgment upon the Master's report and the pleadings in said cause, and upon the plaintiffs' motion to aside the conclusions and recommendation of said Master, and after argument of counsel and the court being well and sufficiently advised in the premises, finds:

First. That said cause was transferred to Carter County, Oklahoma, for trial, by written agreement of all parties interested, for the reason the district judge in Grady County was disqualified from trying same.

Second. The court finds that said suit was originally brought by the plaintiffs, F. E. Riddle and Matt Cook vs. W. D. Bell, Thomas Blair, James Ratcliff, and Theodore Fitzpatrick, and that R. M. Ireland and Ella Cross, upon their own motion, were made parties defendant.

Third. That thereafter, and while the suit was pending, the defendants, H. B. Johnson, E. B. Johnson and the First National Bank Building Company, a corporation, purchased whatever in-



terest in said property involved was claimed by the said R. M. Bourland and Ella Cross, and that said last parties defendant were made parties defendant upon application of plaintiffs, and made their appearance in said cause, and that they are the real parties defendant in interest in this matter.

Fourth. That sometime in the year 1892, Theodore Barnhart, a citizen of the United States, rented the lot in controversy from one Theodore Fitzpatrick, also a citizen of the United States, and that the lot was at that time vacant and unimproved and the title thereof in the Chickasaw Tribe of Indians.

Fifth. That Barnhart thereafter went into possession of said lot and erected improvements thereon, a building in which he conducted a meat market, and that said improvements were his sole and separate property under an agreement between Fitzpatrick and Barnhart that said improvements were to be the property of Barnhart.

Sixth. That in September, 1897, Barnhart sold the improvements to J. P. Ellis, who went into possession and made  
467 some additional improvements, to the value of about \$75.00.

Seventh. That on the 28th day of June, 1898, the date of the final ratification of the Atoka Agreement, the said Ellis was the exclusive owner of said improvements aforesaid and of all the improvements on said lot.

Eighth. That on or about the 7th day of July, 1898, the said Fitzpatrick filed an action of unlawful detainer in the United States Court at Chickasha against the said J. P. Ellis, for the possession of said lot, and that thereafter he filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendants from preventing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the terms of the Curtis Act to purchase said lot; that said injunction was by the court refused; that said Ellis filed his answer in said cause, denying the allegations in said complaint and set up the fact that he was the exclusive owner of permanent, substantial and lasting improvements, other than temporary houses, tillage and fencing, upon said lot.

Ninth. That in October 1900, said cause came on for trial before a court and jury and that the issues were found in favor of the plaintiff Fitzpatrick, for the possession of said lot. That thereafter the defendant Ellis prosecuted an appeal to the Indian Territory

Court of Appeals, which was by that court affirmed, and that  
468 he further prosecuted an appeal by writ of error from that court to the Circuit Court of Appeals for the Eighth Circuit, and that in November, 1902, said court affirmed the decisions of the lower court in said cause.

Tenth. That the improvements upon said lot were not in any way in issue in said unlawful detainer suit, and that the ownership of same by J. P. Ellis was not denied or disputed either by the pleadings or the evidence of the said Theodore Fitzpatrick, but in the

pleadings and evidence the said Fitzpatrick admitted the ownership of said improvements to be in the said Ellis and that they were in no way adjudicated in said case.

Eleventh. That on the 8th day of April, 1899, and while said unlawful detainer suit was pending, the said Theodore Fitzpatrick by his quit-claim deed transferred and quit-claimed to Ella Cross, what interest he had or claimed in said lot; that said Fitzpatrick did not claim to own any of the improvements on said lot and did not attempt or pretend to transfer the same to the said Ella Cross.

Twelfth. That the said Ella Cross and J. E. Cross, her husband, on the 18th day of September, 1900, quit-claimed their one half interest within and to said lot to R. M. Bourland.

Thirteenth. That R. M. Bourland, joined by his wife, and Ella Cross, joined by her husband, on May 25, 1903, conveyed their interests in the entire lot to defendants, E. B. and H. B. Johnson.

469 Fourteenth. That Ellis, on the — day of —, — conveyed his interests to F. E. Riddle and Matt Cook, and that the prior right to purchase said lot was awarded by the townsite commission at Chickasha to the said Riddle and Cook and confirmed by the Interior Department. That in June, 1902, the said Riddle and Cook paid to the United States Indian Agent \$375.00, the amount required under the Treaty to be paid in the purchase of said lot, and that in May, 1907, a patent was issued conveying the interest of the Indian Tribe in said lot to the said Riddle and Cook. That such award and such patent were issued after a contest between E. B. Johnson and H. B. Johnson, as contestants, and F. E. Riddle and Matt Cook, as contestees, over the right to purchase said lot, before the United States Inspector, Commissioner of Indian Affairs and the Secretary of the Interior, in which after evidence heard contestees prevailed.

Fifteenth. That on the date that the townsite commission laid out the town of Chickasha and on the date the plats were approved by the Secretary of the Interior, the said J. P. Ellis was the owner of the permanent, substantial and lasting improvements other than fences, tillage and temporary houses on said lot.

Sixteenth. That Bourland and Cross, the grantors, of defendants herein, caused their attorney to appear before Roy G. Bradford, one of the Clerks of said Townsite Commission and represented to the said clerk that the said lot was in litigation, and that the said Bradford, believing that the said improvements were also  
470 in litigation made a temporary notation opposite the schedule of said lot upon the records, the words "in litigation," but that said notation upon the ascertainment of the true facts with reference to the improvements, was erased by J. B. Kelsey, a duly authorized clerk of said commission, and scheduled the lot to plaintiffs.

Seventeenth. That at the time the said lot was so scheduled to plaintiffs, that the improvements upon same were not in any way in litigation, that plaintiffs held a bill of sale from Ellis for said improvements, showing purchase of same for a valuable considera-

tion, and presented same before said commission, claiming thereunder to be the owners of said improvements, and that neither the defendants nor their grantors made any claim before said commission that they owned any improvements upon said lot or demanded that said lot be scheduled to them by virtue of their ownership of the improvements therein.

Eighteenth. That Fitzpatrick, Cross & Bourland were all white people and not members of any Indian Tribe.

Nineteen. That H. B. Johnson, one of the parties defendant herein, entered into a contract with J. P. Ellis whereby he leased a portion of the lot in controversy from Ellis on the 1st day of January, 1902, and that he agreed in said lease to surrender improvements thereon erected by him and possession of the leased portion of the lot back to Ellis at the termination of the term of said lease.

Twentieth. That Ellis, when he first took possession of the premises under his lease from Barnhart, paid to Fitzpatrick the sum of Five Dollars a month for a period of a few months and that he refused and ceased to pay any monthly sum or any money whatever to Fitzpatrick as rent or otherwise, after April 1st, 1898.

Twenty-first. That there is no record or other evidence of the origin of Fitzpatrick's claim to the lot in question except the allegation that he bought the same from an Indian.

Twenty-second. That the defendant, W. D. Bell, Thos. Sinclair and James Ratliff, and Theodore Fitzpatrick, have filed their answer disclaiming any interest in and to the property described herein.

Twenty-third. The Court further finds, on evidence now introduced, by consent of parties, that while the defendants E. B. Johnson and H. B. Johnson were in possession of said lot they erected valuable improvements upon the same, the value of which are equal to the rents collected by the defendants and due the plaintiffs on said lot up to the 1st day of June, 1909, and the court further finds that the said defendants E. B. and H. B. Johnson and the First National Bank Building Company are entitled to offset the value of the improvements erected by them against said rents up to June 1st, 1909. I find that the rents amounted to \$6,486.00.

Twenty-fourth. The Court finds that by reason of the claim made to said property by said defendants and by reason of certain quitclaim deeds as described in their pleadings it has a tendency to cloud the title to the property involved.

Twenty-fifth. The Court further finds that the said F. E. Riddle, since the institution of this suit, has purchased all the interest of Matt Cook within and to said property and that said Riddle is now the legal and equitable owner of all of said property involved and entitled to the recovery of same.

Twenty-sixth. The Court also finds that the defendants, Fitzpatrick, Bell, Sinclair, Ratliffe, Bourland and Cross, have at this time no interest in, and make no claim to said property, they hav-

either disclaimed ever having any interest, or transferred their interest to the defendants, E. B. Johnson and H. B. Johnson. It is therefore considered, ordered and adjudged by the Court that said plaintiff, F. E. Riddle, do have and recover of and from said defendants, W. D. Bell, Thos. Sinclair, Theodore Fitzpatrick, M. Bourland, Ella Cross, E. B. Johnson, H. B. Johnson and the First National Bank Building Company, a corporation, said Lot Number Three (3) in Block Number Forty-six (46), as per the official plat and map of the City of Chickasha, Oklahoma, together with all the improvements thereon situated.

It is further considered, ordered and decreed by the court that said quit-claim deeds described in the pleadings herein, to wit: the quit-claim deed executed and delivered to R. M. Bourland and Ella Cross by Theodore Fitzpatrick, on the 8th day of April, 1899, and the quit-claim deed executed and delivered by the said Ella Cross, joined by her husband, J. E. Cross, to R. M. Bourland, on the 18th day of September, 1900, and likewise the quit-claim deed made and executed by the said R. M. Bourland and Ella Cross to E. B. Johnson and H. B. Johnson, on the 25th day of May, 1903, and the same are hereby cancelled, set aside and held for naught, and that the cloud now existing against the title of said plaintiff by reason of the existence of said instruments of record, and by reason of the claims to said property by said defendants, be and the same hereby removed, and title to said property and the right to possession thereof is hereby quieted in the said plaintiff, F. E. Riddle.

And it further appearing to the court that the Special Master in Chancery in this case, J. T. Blanton, has charged for his services the sum of Three Hundred dollars, one hundred and fifty dollars of which has been paid by the defendants, and it further appearing to the court that said charge is a reasonable one and that the balance of One Hundred and Fifty dollars due said Master in Chancery has not been paid, it is further ordered that said balance due the said Master, J. T. Blanton, to wit the sum of One hundred and fifty dollars, be taxed as costs in this case.

And it is further ordered, considered and decreed that the plaintiff, F. E. Riddle, have judgment for his costs herein expended and for all of which let execution and writ of restitution for the premises and property herein involved issue.

To which judgment of the court the defendants, E. B. Johnson and H. B. Johnson and the First National Bank Building Company then and there in open Court duly excepted and to each and every finding therein, and the plaintiff also excepted to the judgment of the court upon the question of the improvements offsetting the rents.

(Signed)

S. H. RUSSELL, *Judge.*

And on the back of said Journal Entry appears the following endorsement: Filed In Open Court, June 11, 1909. C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

The opinion of the Court was rendered in writing and is in the words and figures following to wit:

*Written Opinion of Judge Stilwell H. Russell.*

In the District Court of Carter County, State of Oklahoma.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

*Opinion of the Court.*

This is an action of ejectment brought by the plaintiffs, who allege that they are the legal owners and entitled to the immediate possession of Lot 3, Block 45 of the City of Chickasha, against the defendants, who assert ownership and hold possession of said lot. The case has had a tempestuous legal career and has been tossed about upon the high seas of litigation for many years, originating in the United States Court for the Southern District of the Indian Territory, referred by it to a Master in Chancery for findings, thereafter vibrating between the Federal Court and the State Court of Grady County, in the uncertainty of the transitional period from territorial to State government, finally coming to port in the District Court of Carter County, by agreement of parties, for adjudication, the whole case being submitted to this court for a decision upon the merits.

The case has been so warmly contested by both sides and such acumen and ability brought to bear upon the issues by the  
476 learned counsel engaged, that it has developed in its course many lateral branches which we deem unnecessary to track out for the purposes of this decision, though they have not been without effect in affording light upon what we deem the gist of the action. Winnowed down to the concrete point in issue, the question presented for our decision is purely and simply a construction of the following provisions of the Act of Congress adopted June 28th, 1898, known as the Curtis Act and embodying the so-called Aroka Agreement:

"It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member to be appointed by the Executive of the Tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the President of the United States. Each of said commissions shall lay out town-sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the Clerk's office of the United States District Court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary

houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the Treasury of the United States one fourth of the purchase price, and the balance in three equal annual installments and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot or the limit or extent of said town either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to act with said commission, who is not interested in town lots, who shall act with them to determine said value.

If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot with the improvements thereon shall be sold at public auction to the highest bidder under the direction of the aforesaid commission, and the purchaser at said sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one half per centum of said appraised value of the lot and shall pay sixty two and one half per cent of said appraised value into the Secretary of the United States Treasury, under regulations to be established by the Secretary of the Interior, in four installments, as hereinbefore provided. The Commission shall have the right to reject any bid on such lots which they consider below its value.

On June 28th, 1898, the date upon which the foregoing provision became effective, and when whatever rights or privileges were therein granted accrued to the parties entitled to them, the following state of facts existed in respect to the lot in controversy:

The fee simple to the lot was in the Cicksaw Nation. One J. P. Ellis, a white man and citizen of the United States, was the absolute and undisputed owner of certain improvements thereon, part of which he had acquired by purchase from one Theodore Barnhart, who had built and occupied them for several years for business purposes, and part of which he had himself erected thereon, and all of which improvements were subsequently found by the Townsite Commission to be of a permanent, substantial and valuable character within the meaning of the provisions of the Atoka Agreement. Ellis was also in possession of the lot in question, but his possessory title to same was disputed by a suit at law filed on July 7, 1898, by Theodore Fitzpatrick who set up as the basis of his suit that he was the landlord of the said Ellis, as he had been of Ellis's predecessor, Barnhart, and that Ellis during the first few



months after his entry upon the premises had attorned to him for the rent of the land, but had ceased to do so upon the last of April, 1898. The source of Fitzpatrick's title, or claim of title, is not disclosed by either the pleadings in the case at bar, or in those of the unlawful detainer suit brought by him against Ellis and which were considered in evidence in this case, and only a hazy hint has been developed from all the evidence taken in the case that he somewhere, at some time, and in some manner got it from an Indian of the Chickasaw Tribe. So far, however, as record proof is concerned, Fitzpatrick's title appears to have been of the ipse dixit variety, not uncommon in our territorial days, before the reign of law began and the simple rule sufficed many of the self-constituted "landlords" of that day, that "let them take who have the power and let them keep who can." At any rate, it appears that Fitzpatrick began business as a landlord sometime in the year 1892, when he permitted Theodore Barnhart, under whatever power, or authority he claimed over the lot in question, to go upon it as one of the active business men of the town of Chickasha and erect his improvements thereon. A written lease for twelve months was entered into between the two, at a stipulated rental to be paid by the said Barnhart to the said Fitzpatrick, and after the expiration of the term of said lease, Barnhart held over for several years under a verbal agreement with Fitzpatrick, who continued to collect his tribute from Barnhart until some time in the year 1897, when Barnhart sold all his right, title and interest in and to the improvements, to Ellis. Ellis paid a few months' rent to Fitzpatrick and then, claiming that he had paid such rent to Fitzpatrick under the misapprehension and belief that the latter was an Indian Agent, he, the said Ellis being a new-comer into the country and unfamiliar with the system of land tenures, from and after the 1st of April, 1898, ceased paying the monthly tribute to Fitzpatrick.

479 The unlawful detainer suit brought by Fitzpatrick against Ellis for possession of the lot was decided in Fitzpatrick's favor in both the lower court and the Court of Appeals, the final decision of the latter court having been rendered on October 22, 1902, giving the possession to Fitzpatrick and his successors in interest. Long prior to this date, however, Fitzpatrick had disappeared from the scene of legal activity. On the 8th day of April, 1899, before his suit in unlawful detainer had come to trial in the lower court, he quit-claimed to Mrs. Ella Cross all his right, title and interest in and to said lot, and she, in turn, thereafter, on the 18th day of September, 1900, conveyed an undivided one-half interest therein to R. M. Bourland, and afterwards, Mrs. Cross and Bourland, on the 25th day of May, 1903, conveyed said property to defendants E. B. and H. B. Johnson. In the meanwhile, Ellis also had parted with his interests to the plaintiff, F. E. Riddle and one Mat Cook, and subsequently Riddle acquired the interest of Cook.

It was not until the Spring of 1902, that the machinery of the government, in pursuance of the Townsite Act, began to move in Chickasha. A contest was filed before the Townsite Commission by the said E. B. and H. B. Johnson, as contestants, against F. E. Riddle



and Mat Cook, as contestees, and after an investigation in which the commission and the land department seem to have taken cognizance of every phase of the claims of the opposing parties, including the unlawful detainer suit brought by Fitzpatrick and after elaborate opinions rendered by the United States Inspector, the Commissioner of Indian Affairs and the Secretary of the Interior, the right 480 to purchase the lot as the owners of permanent, substantial and valuable improvements thereon, was awarded to F. E. Riddle and Mat Cook, who afterwards paid the required payments of the purchase price and received a patent to the lot, in pursuance of the law, in May, 1907. The defendants in the meanwhile having been legally put into possession of the premises, this suit in ejectment was brought.

Whatever may have been the doubts formerly existing as to the right of a court of equity to review the acts of such tribunals as Townsite Commissions, constituted and empowered as was the Chickasha commission, (and we find such doubts expressed in the books by such eminent jurists as Chief Justice Waite, Justice Harlan and Justice Blatchford) it seems now to be the settled law that when Congress has created any board or commission with exclusive authority and full jurisdiction to investigate and determine the right to purchase land under the laws of the United States, that the findings, rulings and judgments of such commission or board are conclusive upon all courts except after said board, commission or land department have exhausted their jurisdiction by final judgment and determination of said matter and issuance of patent, courts of equity can only impeach or set aside said decision or judgment of the land department, or of such board or commission, for fraud practiced upon them by the successful party, and for error of law upon the admitted facts where they have given the right to the successful party to purchase, when as a matter of law it should have been given to the other party.

In this case there appears, in our opinion, to be no proof 481 of fraud practiced upon the Commission calling for equitable intervention, and if error of law has been committed in recognizing the plaintiffs' right to purchase, it would be such as would arise from an interpretation of the provisions of the Curtis Act hereinbefore set out and which states that the preference right to purchase should be awarded to the "owner of the improvements" on each lot. This is the primary question for decision by this court. If it be found that they have correctly interpreted the law and scheduled the lot in question to the right party, then will follow the question, was the award of the right to purchase to the plaintiffs impressed with any trust in favor of the defendants by reason of the alleged relation of landlord and tenant existing between their predecessors in interest, and whether or not the plaintiffs were estopped, by reason of such relation, from availing themselves of a right granted by the Act of Congress to them as "owners of improvements".

And first, as to the ownership of the improvements, we believe the evidence, taken in connection with the pleadings in the unlawful detainer suit which are considered in evidence, put the question of

the ownership beyond the boundaries of dispute. In fact, it does not appear that Fitzpatrick ever laid claim to the improvements, nor did the defendants or their attorneys, at any time while the Town-site Commission was in session and engaged in scheduling the lots in Chickasha, appear before that body and make any claim of ownership of the improvements on the lot in controversy, nor did they demand that the lot be scheduled to them as the owners of the

482 improvements. The view taken by the Land Department of the provision of the law in question may best be understood by an excerpt from the departmental letter of Acting Commissioner Larrabee, in passing upon the contest then pending between plaintiffs and defendants involving title to the lot in controversy here. This will show clearly and concisely the Government's interpretation of the act of the National Legislature, which was then in process of execution in accordance with such interpretation:

"The title to the lot in controversy at the time Fitzpatrick set up claim to it, and when Barnhart and Ellis entered under him, was in the Chickasaw Nation, and he (Fitzpatrick) had no improvements thereon. The claims of these parties did not divest it of title. They were not even tenants by sufferance. They were mere trespassers and occupied the lot in direct violation of section 2118 Revised Statutes. The lot which they both claimed was the property of the Nation and subject to such laws as Congress might choose to enact. On June 28, 1898, the Atoka Agreement became effective. By its provisions the owner of improvements on town lots was given the right to purchase on certain conditions. It also declared that all unimproved lots should be sold at public auction and the proceeds turned over to the nation. The town lots of Chickasha became subject to that law from and after its passage. The idea of any person holding, or being allowed to purchase except at auction, property on which he owned no improvements, is negated by the terms of the Act. A certain species of rights were recognized and no others. For a claimant to fail to come within the provisions of the law leaves no alternative but to schedule the lot to one who does come within its provisions, the owner of the improvements, or sell it at public auction. The law is clear and unequivocal on this point. Fitzpatrick's right in the lot in controversy were extinguished by operation of law on June 28th, 1898, as he owned no improvements thereon at that time. Ellis, as actual occupant of the lot, ceased to be the tenant of Fitzpatrick, and Congress, having declared Fitzpatrick's claim at an end, had, by virtue of the ownership of the improvements, an indefeasible right in law to purchase it."

But, whether or not the Commissioner's conclusion in respect to the termination of the landlord and tenancy relation between the parties was correct, as a proposition of law, and even granting that it was still in existence, it would require a straining of every  
483 rule of interpretation to say that an error of law was committed in awarding the right to purchase to Ellis, even if a tenant, in the absence of any showing or claim by Fitzpatrick that he owned the improvements. In fact, a clear error of law would have been made, had the commission traveled to the scene of action the

day after the law became effective and scheduled the lot to Fitzpatrick on his claim of title, instead of to Ellis, on his claim of ownership of improvements, and of course the successors of each of them obtained no greater rights than they possessed at that time. In our opinion, the relation of landlord and tenant was not a matter for the consideration of the commission except in so far as it bore upon the question, who was the owner of the improvements upon the lots. The Act of Congress undoubtedly granted to the occupants of the lots a new right, not theretofore in existence. The legislature in passing the Act is presumed to have been fully advised of conditions in the Indian Territory. It knew that the title was in the Indian Nation. It knew that illegal leases were in existence. It knew that white men were usurping the possessory rights of the Indians, some as bona fide pioneers, erecting improvements thereon and embarking in business, and some as a kind of self-constituted feudal lords, exacting tribute from the real pioneers and waxing rich without labor other than that necessary to collect their "ground-rents",—a system that seems to have been so closely akin to that employed by the old Scotch caterans, or cattle-lifters, who exempted the cattle of those who paid a monthly "blackmail" from their predatory attentions, that the same word might be used to designate the tribute exacted in each instance.

484 If the intent of the legislature had been to provide for the white intruders upon Indian lands who had set up business as landlords, who never made any improvements upon their own account, but stood by and collected illegal rents from "tenants" who did occupy and improve the lands, it could and would have done so in express terms. But it failed to do so, and what it failed to do, as a matter of legislation, it is not for the courts to supply. "The intent of the law-maker," says the Supreme Court of the United States, in the case of *U. S. vs. Goldberg*, 158 U. S. p. 94, "is to be found in the language that he has used. He is presumed to know the meaning of the words and the rules of grammar. Courts have no legislative functions and simply seek to ascertain the will of the legislature. It is true that there are cases in which the letter of the statute is not deemed controlling, but such cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies which it might seem wise to have specifically provided for justify any judicial addition to the language of the statute."

Much has been said in this case about the solicitude of the Government for the pioneer and we believe it has been said with truth that it watches over his interests with a jealous eye, but we have yet to learn of an instance where the mantle of its protection has been thrown over the "sooner," "the jumper," or the "trespasser" upon the Indian lands.

Upon this branch of the case, we believe that no other construction could have been placed upon the provisions of *of*  
 485 the Curtis Act and Atoka Agreement than that placed upon it by the Townsite Commission; that they committed no error

of law in awarding the right of purchase of the lot in question to the plaintiffs. The act must be construed to mean just what it says, if its language is clear and unambiguous, and it is not for the court to say that the legislature made a mistake when it said that the owner of the improvements on each lot had the right to purchase in accordance with the terms of the act, without any reservation of right to a landlord, by reason of his relation to a tenant who owned the improvements. We cannot bring ourselves to believe otherwise than that the owner of the improvements, irrespective of the fact that he was the landlord or the tenant, had, under the terms of the legislative act or treaty agreement the right to purchase the lot upon which such improvements were placed.

But granting that the lot was scheduled to the plaintiffs rightly, so far as the Townsite Commission was concerned, and in pursuance of their plain duty under the law, the question arises, does equity, in view of the relation of landlord and tenant alleged to have existed between the predecessors in interest of plaintiffs and defendants, impress upon the patentees a constructive trust in favor of the successors in title of Fitzpatrick?

That such a trust relation does often arise between landlord and tenant is beyond question, but all such instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive, which includes acts in violation of fiduciary obligations. (Pomeroy *Equity Jurisprudence*, Sec. 155.)

486 The element of fraud, or violation of a trust, or *mala fides* does not enter into the case at bar. The rule is that where "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts, is, unless he has some other and better right thereto, a voluntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

In this case there appears to be a very slender foundation for the application of the doctrine of constructive trusts. Here the plaintiffs by due process of a quasi-judicial tribunal obtained the title to the land. They had clearly an "other and better right thereto" than the defendants. If the lot had not been, in the first instance, scheduled to them, it could not, under the law, have been scheduled to Fitzpatrick or his successors, as they had not complied with the requirements of the law. The contention that the latter intended to do so is purely conjectural and an afterthought, as it did not appear in the controversy until after the date upon which the Atoka Agreement became effective, whereupon the plaintiff Fitzpatrick in the unlawful detainer suit amended his complaint so as to include such an allegation. But had the Townsite Commission come upon the ground and began scheduling the lots immediately after the passage of the Act, they would have found that Fitzpatrick had no improvements upon the lot and had expressed no intention of putting any on. But, however that may be, it was conditions that confronted and governed the action of the Commission, not conjectures and intentions. A new right had been granted by law to the  
487 owners of improvements upon town lots and the Commission was executing that right. The defendants were not the bene-

fealties of that right and the plaintiffs deprived them of no right, or acquired none in detriment of their rights, that would charge them as trustees in the contemplation of equity. The tenancy with which it is sought to bind the hands of plaintiffs from claiming rights under Ellis and charging them with trust obligations is only to be considered as to the bearing it had upon the ownership of the improvements. At the best, it was a very questionable relation, and while the rule is well established that the estoppel which binds a tenant from denying his landlord's title does not depend upon the validity of such title, yet such estoppel does not extend to the rights of the tenant to show that the title of his landlord had been extinguished by operation of law, as in this case, and that a new right had been created by law of which he, the tenant, was the beneficiary.

The case of *Fraer vs. Washington*, 125 Fed. 280, 60 C. C. A. 197, is strongly relied upon by defendants' counsel as controlling in this case. The facts are essentially different, in that Washington, the landlord there, was a member of the Chickasaw Tribe of Indians and as such had an undoubted right of occupancy of the lot in controversy and that his lease to Fraer contained an express stipulation in regard to the ownership of the improvements at the termination of the lease, that "said property shall be delivered to said Washington upon his paying or satisfying said James Fraer or his assignees for all improvements put thereon while the same was so rented to said James Fraer."

488 The language of the Court in its decision in that case abounds with obiter dicta that point strongly to a different conclusion had that court been dealing with the state of facts presented in the case at bar.

"It is true" said the court, "that the act (i. e. the Curtis Act) concedes to the owner of improvements upon any town-site lot the preference right to purchase the lot after the town-site has been surveyed and platted and the lots have been appraised, on making certain specified payments within a certain period; but it does not appear in the present instance that any of these acts have been done, or that the time has arrived when a purchase can be effected. If it has arrived, it is by no means clear that the lessee is the owner of the improvements which he made during his term.

In the case at bar, the ownership of the improvements is beyond question,—in fact was not disputed except through a suggestion of legal forfeiture which we deem untenable, and the purchase has been completed and patent issued.

Again the Court said:

"We are of the opinion that the obligation of the lessee to restore possession remained the same after the passage of the Curtis Act as before, and that nothing would free him from his contract obligation to surrender the possession of the demised premises, save, perhaps the purchase of the lot under the provisions of the Curtis Act after an appraisalment thereof, should he be allowed, on application to the proper authorities, to make such a purchase."

This last utterance of the court is, in our opinion, very significant when applied to the facts in this case, because here Ellis's successors

were allowed, upon application to the proper authorities to make such a purchase and fulfilled every requirement of the government necessary to a patent.

In *Ellis v. Fitzpatrick*, 118 Fed. 430, the unlawful detainer suit referred to here between the predecessors in interest of plain-  
 489 tiffs and defendants herein, the question of title was not considered and the question decided there was simply, as stated by the Court in its opinion, that "the complaint stated a cause of action for unlawful detainer and as this is the only question which is before this court for review and as it was decided by both lower courts the judgment of each court is hereby affirmed."

We are also cited by defendants to the case of *Whitney Lumber Company vs. Crabtree*, 166 Fed. Rep. Adv. Sheet March 25th, 1909, which appears to be the latest deliverance of the Circuit Court of Appeals involving an interpretation of the provision of the Atoka Agreement under discussion here. The lessor in that case was a member of the Creek Nation. The facts were widely different from the case at bar and the main contention of the lessor was pitched upon alleged rights accruing to them under the Arkansas Betterment Act, though they also relied upon the provisions of the Curtis Act. The award of the Townsite Commission, however, in that case had been to Mrs. Crabtree, the wife of the Indian lessor. The Court held the *Fraer vs. Washington* case as controlling, in so far as its interpretation of the Curtis Act was concerned, but stated the conclusion of the court in that case to be that

"Congress did not intend that white men who had obtained temporary possession of town-site lots or land in the Indian Territory from Indians by means of leases should make use of the possession so acquired to secure a fee simple title to the demised property, to the exclusion of Indian lessors to whom they had covenanted to restore the possession."

Which is a very different question from the one presented in the present case.

490 The Court in the latter case further said:

"Conditions in the territory were exceptional, and contracts for and conveyances of real property were not governed by the rules which obtained elsewhere between persons not under disability. Moreover in that country the common tenure of the white man or non-citizen was by leasehold, which implied conditions and responsibilities to members of the Indian Tribes,"

as in the case of *Crabtree*, a citizen of the Creek Nation, whereas in the present case, *Fitzpatrick* was a non-citizen, a trespasser, and entitled to no consideration whatever from the Government, under the provisions of the Curtis Act, by reason of his claim of title to the lot in question.

We have carefully read all the cases that have been submitted and which our research could develop touching upon the interpretation of the provision of the Curtis Act in question and we have failed to find any case wherein the appellate courts have passed upon facts similar to those in the case at bar, and believing that the Townsite Commission thoroughly investigated in the first instance



all the facts connected with the lot in question and scheduled the lot in accordance with the language of the statute, and thereby committed no error of law, we do not feel that we would be justified, in pursuance of an equitable theory, however ingenious and interesting, in undoing their work.

The judgment will be for the plaintiffs.

(Here follows findings of facts embodied in the judgment of the court.)

(Signed)

S. H. RUSSELL, *Judge.*

And afterwards, to wit, on the 11th day of June, 1909, and within three days after said decree of the court was rendered in said cause, defendants filed in said court their motion for a new trial, which said motion is in the words and figures following, to wit:

*Motion for New Trial.*

In the District Court of Carter County, State of Oklahoma.

No. 370.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now comes the defendants, E. B. Johnson and H. B. Johnson, and the First National Bank Building Company and move the court to grant them a new trial herein, for the following reasons, to wit: First. The Court erred in its finding of facts in failing to find that P. Ellis was the tenant of Theodore Fitzpatrick, and in also failing to find that the said Ellis waived and abandoned his rights to move the improvements from the lot in controversy.

Second. The Court erred in finding that the title or ownership of the improvements was not involved in the suit for the possession of the property, brought by Fitzpatrick against Ellis, in the United States Court for the Southern District of the Indian Territory, at Chickasha.

Third. The court erred in finding that Fitzpatrick the plaintiff in said suit, by pleading, denied his ownership of the improvements on the lot, and conceded the ownership of Ellis.

Fourth. The Court erred in finding that the judgment of the Court in the said suit of Fitzpatrick against Ellis did not adjudge that plaintiff was entitled to the possession of the improvements on the lot, and in finding that the ownership of the improvements was concluded in said judgment against the claims of Ellis.

Fifth. The Court erred in finding that the said Ellis continued to be the owner of the improvements after Fitzpatrick had obtained judgment for their possession.

Sixth. The court erred in finding that the ownership of the improvements on the lot in controversy were in no manner involved in the litigation between Fitzpatrick and Ellis, and that the owner-



ship of the same was, in no manner, adjudicated by the judgment of the court in that case.

Seventh. The Court erred in finding that Ellis was the owner of the improvements on the lot at the date that the Townsite Commission platted the town of Chickasha.

Eighth. The court erred in finding as a matter of fact that the improvements on said lot were not, in any way, in litigation at the time the lot was scheduled to Riddle and Cook.

Ninth. The Court erred in finding that Bourland and Cross then owned said lot and did not make any claim to the ownership of the improvements at the time the Townsite Commission were platting the town of Chickasha.

493 Tenth. The Court erred in attaching any importance to the fact that H. B. Johnson, one of the defendants herein, had made a contract with J. P. Ellis, for an easement (the use of a privy) on the lot in controversy, as such fact, if it be a fact, has not the remotest connection with or bearing upon the issues in this case.

And because the court erred in his findings of law in the following respects:

First. The court erred in failing to give the judgment in the unlawful detainer case, in favor of Fitzpatrick against J. P. Ellis, full faith and credit, and in failing to find that such judgment was conclusive and binding on the parties, and not subject to attack by them or their privies, as to the relation of landlord and tenant, as to the unlawful holding-over of Ellis, and as to his denial and repudiation, not only of his tenancy but of the title of a landlord.

Second. The court erred in failing to find, as a matter of law, that the said judgment established conclusively the right of Fitzpatrick and his privies to the possession of the lot, together with all the improvements thereon.

Third. The Court erred, as a matter of law, in holding that the ownership of the said improvements on the lot were not involved in the unlawful detainer case and were not concluded thereby in favor of Fitzpatrick and his privies, and against J. P. Ellis and his privies.

Fourth. The court erred as a matter of law, in holding that Fitzpatrick disclaimed ownership of the improvements on the  
494 lot by his pleadings in said unlawful detainer case.

Fifth. The Court erred as a matter of law, in holding that J. P. Ellis, by failing to remove the improvements from the lot, and by refusing to do so, and by setting up a right in the Forcible Entry Detainer case to keep his improvements on the lot, and by declaring his intention to let the ownership of the said improvements go with the right to the possession of the lot, had not thereby waived, abandoned and lost whatever ownership he had in and to said improvements, and whatever right he ever had to remove the same.

Sixth. The court erred in holding, as a matter of law, that J. P. Ellis, was the owner of the improvements at the time the town of Chickasha was platted by the townsite commission.

Seventh. The court erred, as a matter of law, in holding that a notice to the Townsite Commission that the lot in controversy was in litigation was not a notice to the Townsite Commission that the ownership of the improvements was in dispute or litigation.

Eighth. The court erred in holding that after the scheduling of the lot, as in litigation, the Townsite Commission had a right to schedule it to Riddle and Cook without notice to those who had succeeded to Fitzpatrick's rights.

Ninth. The court erred in finding that there was no fraud practiced upon the commission by Riddle and Cook, in inducing the commission to schedule the lot in controversy to them, after it had been scheduled as in litigation at the request of the vendors of these defendants. As the commission was induced to schedule it to Riddle upon their representations that the ownership of the improvements was not in dispute and was in litigation and that the improvements belonged to them, which was essentially untrue.

Tenth. The court erred in holding as a matter of law that the proper interpretation of the Curtis Act gave the owners of the improvements on a lot the preference right to purchase the same as an improved lot without regard to the manner in which such owner obtained possession of said lot from his landlord, and without regard to contractual rights existing between him and his landlord, and without regard to his legal obligations to his landlord.

Eleventh. The Court erred in holding that under the Curtis Act the owner of the improvements acquired the preference right to purchase the lot as against his landlord, though his possession of the lot was wrongful, though his having his improvements on the lot at the time wrongful, in violation of law and of contract, this rewarding a wrongdoer, by giving him the benefits and fruits of his wrongful acts, and punishing the landlord by entailing loss upon him, because the law was not powerful enough and the action of the court non-expeditious enough to dispossess the wrongdoer, before the time for the scheduling of the lot had arrived.

Twelfth. The Court erred in holding that the proper interpretation of the Curtis Act was to favor, uphold and reward lot jumpers and schemers, and those who violated their contracts and defied the courts, instead of the man who obeyed the law, kept his contracts and appealed to the court for protection.

Thirteenth. The court erred in holding that in the enforcement by the Townsite Commission of the Curtis Act, no inquiry could be made as to the right to purchase beyond the bare fact of the ownership of the improvements. That this fact, once established, gave the preference right to purchase the lot to such owner, however wrongful he may have acquired the ownership, however unjust and inequitable it may be, the letter of the law must prevail over its spirit.

Fourteenth. The Court erred as a matter of law, in holding that there was no trust relation arising out of the relation of landlord and tenant between Fitzpatrick and Ellis.

Fifteenth. The court erred in holding that there was no element

of fraud or wrong entering into the conduct of Ellis in reference to the lot, toward his landlord Fitzpatrick. That the wrongful denial of Ellis that he ever rented the lot from Fitzpatrick, or in any manner became his tenant, the wrongful denial by Ellis of Fitzpatrick's rights to rent the land, Ellis' wrongful assertion that he had a superior right to the possession of the lot over Fitzpatrick, his ultimate use of that possession to entirely defeat and destroy the rights of his landlord, are not, in the eyes of the law, fraudulent and in violation of his trust relation.

497 Sixteenth. The court erred in holding that whatever rights to the lot Ellis acquired by reason of his possession obtained and held under Fitzpatrick, did not enure to the benefit of Fitzpatrick, and were held by Ellis in Trust for him and his privies.

Seventeenth. The Court erred in holding that whatever rights Riddle obtained by reason of the issuance of the patent or deed to him to this lot, was not, under the circumstances, held by him in trust for the defendants.

18th. The court erred in denouncing men who obtained the possession and control of lots in the Indian Territory as feudal landlords unjustly exacting tribute and praising and rewarding men who held possession of such lots in violation of their contracts, in violation of law and in defiance of the judgments of the courts.

19th. The court erred in holding that H. B. Johnson and E. B. Johnson instituted the contest for the purchase of this lot before the townsite commission, when in truth the Johnsons, at that time, set up no claim to the lot, but Bourland and Cross, who were then the owners of the Fitzpatrick interest, in person and through attorneys, saw the Townsite Commission and upon their statements the lot was scheduled as in litigation. If they were not claiming the right to purchase this lot as an improved lot, they would hardly have done this. One of the clerks of the commission afterwards, at the instance of Riddle, and without the knowledge of the  
498 commission, changed this scheduling and awarded the lot to Riddle and Cook and gave no notice of the change to Bourland and Cross.

20th. The Court erred in finding that there was no evidence to sustain the charge of fraud on the part of the defendant in procuring the lot to be scheduled to him by the Townsite Commission, when the record shows that Bourland and Cross claiming the right to purchase this lot as an improved lot, but realizing that their right was then being litigated in the courts, appeared in person and by attorneys before the Commission and procured the lot to be scheduled as in litigation. Afterwards, and on the very day, or the day after that Riddle and Cook obtained the transfer to the improvements from Ellis, they procured one of the Clerks of the Commission to erase the former scheduling and award the lot to Cook. In order to do this, they represented to Kelsy, the clerk who made the change, that the improvements had never been in dispute; that their ownership was conceded to Ellis, though no effort had been made to have the lot scheduled to Ellis. This change was never brought to the attention of the commission,

and the Chairman of the Commission, in his letter to the department, said that it was erroneously made. No notice of this change was given to Bourland and Cross, which clearly evinces the fraudulent purpose of both plaintiff and the clerk who made the change.

21. The court erred in rendering judgment for the plaintiff.

C. C. POTTER,  
*Attorney for Defendant.*

499 And on the back of said Motion for New Trial appears the following endorsement:

Filed in Open Court June 11, 1909. C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

And afterwards, to wit, on the 11th day of June, 1909, said Motion for a new trial coming to be heard, the same was by the court overruled, to which ruling and action of the court the defendant at the time excepted and gave notice to the court of his desire and intention to appeal said case to the Supreme Court of Oklahoma, which appeal was by the court allowed and time granted within which to prepare and serve case made. The following is the Journal Entry of the Order of Court thereon:

*Journal Entry Overruling Motion — New Trial and Granting Appeal.*

In the District Court of Carter County, Oklahoma.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Now on this, the 11th day of June, 1909, the same being one of the regular days of the May Term, 1909, of the District Court of Carter County, Oklahoma, came on to be heard the motion of the defendants, H. B. and E. B. Johnson and the First National Bank Building Company for a new trial and rehearing in said cause. The same after being duly considered by the court is overruled and denied to which ruling the said defendants then and there in open court excepted.

And the defendants having requested the court to make special findings of law and facts and the court having done so, the defendants also except to each of said findings.

It is further ordered that the plaintiff be allowed 20 days in which to file supersedeas bond and obligation herein, the amount of which bond the court now fixes at the sum of \$5,000.00, and it is further ordered by the Court that the defendants be allowed sixty days from this date in which to prepare and serve a case-made herein, and that the plaintiffs have ten days thereafter in which to prepare and present amendments, the petition in error to be

Filed in Open Court, July 8, 1909. C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

505      The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made and all rulings and orders made thereon, and all exceptions taken by either plaintiffs or defendants to such rulings and orders; all the evidence offered or introduced upon the trial of said cause; and all exceptions taken by either plaintiffs or defendants to the admission or rejection by the court of such evidence; all instructions or declarations of law given by the court as well as those asked by the plaintiffs or defendants, and all exceptions thereto; and the judgment and decree of the court and the exceptions of plaintiffs and defendants thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, findings, evidence, judgment and decree and all proceedings had in said cause.

506                      *Tender & Service of Case-made.*

In the District Court of Carter County, State of Oklahoma.

F. E. RIDDLE, Plaintiff,

vs.

W. D. BELL et al., Defendants.

To F. E. Riddle and His Attorneys of Record:

The above and foregoing Case-made is hereby tendered to and served upon you and each of you as a true and correct Case-made in the above-entitled case and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgment and proceedings in the above entitled cause.

C. C. POTTER,

*Attorneys for Defendants.*

*Acknowledgment and Acceptance of Service.*

We hereby accept and acknowledge due, legal and timely service of the above and foregoing Case-made, this 17th day of Oct., 1909.

A. C. CRUCE,

*Attorneys for Plaintiff.*

507      In the District Court of Carter County, State of Oklahoma,  
Eighth Judicial District.

F. E. RIDDLE et al., Plaintiffs,

vs.

W. D. BELL et al., Defendants.

Be it remembered, That on this the 18th day of October A. D. 1909, at the Court House, in the City of Ardmore, in the County of

Carter, State of Oklahoma, the above and foregoing Case-made was presented to me, Stillwell H. Russell, Judge of the District Court of said County and before whom said cause was tried, to be signed and settled by me as the original case-made herein by the parties to said cause, as required by law.

And it appearing to me that the said Case-made has been duly made and served upon the plaintiffs within the time fixed by the order of this court and in the time and manner and form provided by law, and said plaintiff being present by his attorneys, and it appearing to the court that the said plaintiff having been duly served presents no amendments to the said case made within the time allowed by the orders of the court.

Therefore, the said case-made having been examined by me is true and correct and contains a true and correct statement and a complete transcript of all the pleadings, motions, orders, evidence, findings, judgment and proceedings in said cause,

I hereby allow, certify, and sign and settle the same as the true and correct Case-made in said cause, and hereby order that the Clerk of said Court attest the same with his name and seal of this court and file same as of record as provided by law.

Witness my hand, this the 18th day of October 1909.

S. H. RUSSELL, *Judge.*

Attest:

[Seal District Court, Carter County, Oklahoma.]

C. T. VERNON,

*Clerk of the District Court of Carter County,  
State of Oklahoma.*

Filed in Open Court Oct. 18, 1909, at — o'clock — m. C. T. Vernon, Clerk District Court, Carter County, Oklahoma.

THE STATE OF OKLAHOMA,

*County of Carter:*

I, C. T. Vernon, Clerk of the District Court in and for Carter County, in the State of Oklahoma, do hereby certify that the above and foregoing 471 pages contain a true copy of the original case made in the above cause filed in my office Oct. 18th, 1909.

[Seal District Court, Carter County, Oklahoma.]

C. T. VERNON,

*District Court Clerk.*

Supreme Court, January Term, 1910, January 19th, 1910,  
Eighth Judicial Day.

No. 1190.

C. B. JOHNSON et al., Plaintiff in Error,

vs.

F. E. RIDDLE, Defendant in Error.

Ordered by the court that the motion to dismiss filed in the above cause, be, and the same is hereby overruled.

510 In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. & H. E. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

*Supreme Court Proceedings.*

And now on this September 13th, 1911, it is ordered by the court that W. A. Ledbetter be allowed to withdraw the record in the above cause until to-morrow.

511 Supreme Court, September Term, 1911, September 16th, 1911, Fifth Judicial Day.

No. 1190.

E. B. & H. E. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this day the above cause is argued orally and the cause is submitted on the record, briefs and oral argument.

512 Supreme Court, November Term, 1911, November 28th, 1911, Seventh Judicial Day.

Supreme Court Commission, Division Number 2, Nov. 22, 1911.

No. 1190.

E. B. & H. E. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the above case should be reversed and rendered.

It is therefore considered, adjudged, decreed and ordered that the plaintiff in this case, F. E. Riddle, holds the legal title to lot number three in block number forty-six, as numbered on the official plat of the City of Chickasha, in Grady County, Oklahoma, as trustee for the defendants, E. B. and H. B. Johnson. It is further ordered, adjudged and decreed that the said plaintiff be and he is hereby required and ordered to convey the legal title to the said lot, by deeds of special warranty against the claims of all persons claiming



through, by or under him, to the said defendants within sixty days after the mandate in this case shall be filed in the District Court of Carter County, Oklahoma, And it is further ordered, adjudged and decreed that if the said plaintiff shall fail to execute said conveyance within sixty days after the mandate is filed in the District Court of Carter County, that this judgment and decree shall operate and be available as a conveyance of said lot, and shall vest the legal title in the said E. B. and H. B. Johnson with the same effect, and to the same extent, as if conveyed by him to them by a deed of special warranty, against the claims of plaintiff, and all persons claiming through, by, or under him. Opinion by Rosser, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

Hayes, J. not participating.

514 (Filed Nov. 28, 1911. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and THE FIRST NATIONAL BANK BUILDING COMPANY, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

Error from District Court, Carter County.

Stillwell H. Russell, Judge.

*Syllabus.*

F. not a member of any Indian tribe, leased an unimproved lot in a town in the Chickasaw Nation to B. who erected improvements, the title to which remained in him. He sold to E. and placed him in possession. A. attorned to F. and paid rent for a while. He made other improvements, which remained his property. When he refused to pay rent F. brought an unlawful detainer suit against him. Before it was tried F. sold his interest in the lot to Cross, and she sold a half interest to Bourland but the suit proceeded in the name of F. October 20th, 1900 there was a judgment against E. He gave a supersedeas bond, retained possession, and appealed to the United States Court of Appeals in the Indian Territory, where judgment was affirmed, October 4th, 1901. E. gave another supersedeas bond and appealed to the Circuit Court of Appeals for the Eighth Circuit and retained possession. In February, 1902, when the townsite commission went to Chickasha to schedule the lots, the attorney for Bourland and Cross

appeared before the Commission and had the lot marked "in litigation." On March 26th, 1902, E. transferred his interest to Riddle and Cook. Riddle was his attorney in the unlawful detainer suit. Riddle stated to the Commission that the improvements were not in litigation, and without notice to Bourland and Cross, the lot was scheduled to Riddle and Cook. October 27th, 1902, the Circuit Court of Appeals affirmed the judgment in the unlawful detainer case, and Bourland and Cross were put in possession about the last of January, 1903. They sold their interest to Johnsons. A contest was filed before the townsite commission, and after the appeals were exhausted the lot was patented to Riddle and Cook. Riddle bought Cook's interest. F. stated in the complaint in the unlawful detainer suit that he wanted possession of the lot to improve it, and Bourland and Cross endeavored, during the pendency of the unlawful detainer suit, by injunction to obtain possession of the lot to put improvements on it.

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- Held: (1) That the ownership of the improvements which would give the right to purchase a lot, according to the provisions of the Atoka Agreement, (30 Stat. L. 495) that "each lot on which permanent, substantial and valuable improvements," etc., "shall be valued", and that "the owner of the improvements" shall have the right to buy, must have been joined with lawful possession, and that the ownership of improvements did not confer the right to purchase a lot of which the owner of the improvements was in wrongful possession.
- (2) That Bourland and Cross by the transfer from F. succeeded to his right of possession of the lot.
- (3) That E. held possession of the lot in violation of his contract for more than three years, and that Riddle and Cook, buying from him with notice of his contract and wrongful holding, and obtaining title through his breach of contract, held the title so acquired as trustee for Bourland and Cross, and that Riddle having since taken a conveyance from Cook now holds the entire legal title as trustee.
- (4) That Bourland and Cross, as cestuis que trustent, had an estate in the lot which they could convey to E. B. and H. B. Johnson, and that the Johnsons are entitled to have a conveyance of the lot from Riddle.
- (5) That the Department committed error of law in scheduling the lot 2 and issuing patent to Riddle and Cook, rather than to Bourland and Cross.

Action by F. E. Riddle against E. B. and H. B. Johnson. Judgment for plaintiff and defendants bring error.

Bond & Melton, C. C. Potter, For Plaintiffs in Error.

W. A. Ledbetter, A. C. Cruce, For Defendant in Error.

Reversed and Rendered.

*Statement.*

This is an ejectment suit brought by F. E. Riddle against E. B. and H. B. Johnson and the First National Bank Building Company, and other parties, to recover lot three in block forty-six in the City of Chickasha, in the State of Oklahoma. There was a judgment for plaintiff in the District Court of Carter County, and the defendants, E. B. and H. B. Johnson and the First National Bank Building Company, bring error.

In 1892, Theodore Fitzpatrick, a citizen of the United States, and not a member of any Indian tribe or nation, leased the lot in controversy to one Barnhart. The record does not show by what right Fitzpatrick held the lot at the time he leased it. Barnhart built a small house on the property and afterwards, some time in 1897, Barnhart sold his improvements and transferred the occupancy of the lot to J. P. Ellis, and Ellis placed other improvements on the lot, which cost about seventy-five dollars. Barnhart paid rent on the lot during the time he remained on it, and Ellis paid rent for six months after he bought the improvements. About April 1st, 1898 he refused to pay rent any further, and on the 7th of July, 1898 Fitzpatrick brought an unlawful detainer suit against him in the United States Court for the Southern District of the Indian Territory, at Chickasha, and alleged in that suit, in addition to an ordinary complaint in such actions, that he wanted possession so that he could improve the lot for the purpose of purchasing it. After the suit was brought, on the 8th day of April, 1899, Fitzpatrick conveyed the lot in controversy to Mrs. Ella Cross. On the 18th day of September, 1900, Mrs. Ella Cross conveyed an undivided half interest in the lot to R. M. Bourland. The unlawful detainer suit proceeded in the name of Fitzpatrick, notwithstanding the conveyance from him to Cross, and from her to Bourland, and on the 20th day of October, 1900, the plaintiff recovered a judgment against Ellis for the possession of the lot and one hundred and fifty dollars rent. Ellis appealed from this judgment to the United States Court of Appeals for the Indian Territory, and retained possession of the lot by virtue of a supersedeas bond. The judgment was affirmed in that court on the 4th day of October, 1901, and is reported as *Ellis v. Fitzpatrick*, 64 S. W. 567. From the judgment of the Court of Appeals of the Indian Territory affirming the judgment, Ellis took an appeal to the Circuit Court of Appeals for the Eighth Circuit, gave a supersedeas bond and retained possession.

On the 8th day of February, 1902, the townsite commission went to Chickasha for the purpose of scheduling lots of that town. When the commission went there, one Sayer, who had been the attorney for the plaintiff in the unlawful detainer suit, went to the commission, or to their representative, Roy G. Bradford, and informed him that the property was in litigation, and acting upon this information Bradford marked the lot as in litigation upon the list or schedule of lots of the town.

On the 26th day of March, 1902, Ellis conveyed his interest

in the improvements on the lot to F. E. Riddle and Mat Cook. Riddle had represented Ellis as Attorney with reference to all of the litigation concerning the lot. The afternoon of the day the conveyance to them was made, or the next day after it was made, Riddle went to J. B. Kelsey, who, it appears at that time, was in charge of the schedule, and produced the bill of sale from Ellis and 518 stated to him that the improvements were not in litigation, and that only the lot was in litigation, and requested that the lot be scheduled to Riddle and Cook. Acting upon their request, without notice to Bourland and Cross, or their attorney, Kelsey erased the notation "in litigation" and scheduled the lot to Riddle and Cook. On the 12th day of June, 1902, they were notified that they had a right to purchase the lot, and on the 19th of June, 1902, paid the full price of the lot to the U. S. Indian Agent, at Muskogee.

Some time afterwards, Bourland and Cross learned of this action of the townsite commission, and on September 26th, 1902, protested against it by letter written by their attorneys, Potter & Potter. The correspondence between the attorneys for Bourland and Cross and the townsite commission was continued until the 31st day of July, 1903, when H. B. Johnson remitted to the United States Indian Agent the purchase price of the lot. In the meantime, on the 27th day of October, 1902, the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the Indian Territory Court of Appeals in the unlawful detainer suit. While the appeal was pending in the Circuit Court of Appeals, there was considerable negotiations between Riddle and Johnson with reference to the purchase price of the lot by the Johnsons, and the Johnsons built a party wall upon the line between that lot and another to which they had title, and it appears that there was some sort of an agreement between them and Riddle as to the payment for the wall. It is claimed by Bourland and the Johnsons that Bourland, Riddle and Johnsons were parties to the agreement, and that the person who prevailed in the pending unlawful detainer suit was to pay for half the wall.

That is denied by Riddle, and the contract was not produced 519 at any of the trials. While the appeal was pending, H. B. Johnson and J. P. Ellis entered into the following contract:

**"INDIAN TERRITORY,  
Southern District:**

This agreement made and entered into on this day by and between J. P. Ellis, party of the first part and H. B. Johnson, party of the second part.

Witnesseth: That party of the second part being desirous of using the rear end of lot number three in block forty-six, owned by the party of the first part, and he hereby agrees to erect good, substantial water-closets, and to fence the same in with a good board fence, and to be paid for the use and rent of said premises. It is especially agreed that said improvements so erected shall be owned by and be the property of the first party to be used by him and his tenants for water closet purposes and as a back yard, for a term of 12 months, and until the same are paid for in full, subject to the provisions

hereafter mentioned, in case party of the first part should not be compelled to use the same after the expiration of the first 12 months and in that case he shall pay party of the second part the cost of said improvements less the use of the same for said 12 months, which is agreed upon to be at the rate of one dollar per month. It is agreed that the tenants of party of first part shall have privilege of using one of said closets, so long as they do so without molesting party of the second part and his tenants by using same in such a way as to interfere with said second party and tenants. In case any disagreements should arise, and not settled satisfactory by said parties otherwise, then said party shall have the right of paying the said second party the full cost of said improvements and take full possession of same.

Witness our hands this January 1st, 1902.

J. P. ELLIS.

H. B. JOHNSON."

In January, 1903, after the case was affirmed by the Circuit Court of Appeals at St. Louis, Bourland and Cross obtained possession of the lot with the improvements. They removed the improvements from the lot, and on the 25th day of May, 1903, conveyed the lot to E. B. and H. B. Johnson by deed of special warranty. On the 3rd day of February, 1903, as soon as Bourland and Cross obtained possession of the said lot, Riddle and Cook began this suit against Fitzpatrick and the persons in possession of the lot as tenants. The original defendants filed disclaimer, and upon their motion 520 Bourland and Cross were made defendants. After the Johnsons purchased the lot they were made defendants, and on the 20th day of August, 1907 filed an answer and cross bill, in which all the previous transactions and litigations between the parties were set out. Before their answer was filed a contest was instituted before the land office, and on the 1st day of October, 1906, a decision was rendered by the United States Indian Inspector, J. George Wright. An appeal was taken from his decision to the Commission of Indian Affairs, where it was affirmed, and from the decision of the Commission of Indian Affairs an appeal was taken to the Secretary of the Interior, where it was again affirmed. The findings of fact by the land department were, that Riddle and Cook were the owners of the improvements on the lot at the time this lot was scheduled. It found the other facts as here stated, and found the law, as applied to the state of facts, entitled them to have the lot scheduled to them, and to obtain title upon paying for the lot.

After the final termination of the contest before the Department of the Interior, a patent was issued to Riddle and Cook, dated May 1907. In the meantime Riddle purchased all the interest that Cook had in the property, and by supplemental petition filed August 19th, 1907, set up these facts.

While the suits were pending, and before the lots were scheduled, Bourland and Cross attempted by injunction proceedings to effect an entry upon the lot for the purpose of placing improvements there, but the injunction was refused. After the unlawful detainer suit was finally decided they brought suit upon the bond, under which

the defendant had retained possession, and it was finally determined in that suit that they did not own the improvements on the lot, but that the improvements were the property of Ellis or his assigns.

The present case was referred to J. W. Blanton, Esq., Special Master in Chancery, and he heard the testimony and made report containing findings of law and fact, and recommended a decree that the plaintiff be required to convey the lot to the defendants,

521 E. B. and H. B. Johnson. The District Court of Carter County, to which county the case was transferred after statehood, set aside the report of the Master and rendered judgment for plaintiff, and it is to reverse that judgment that this appeal is prosecuted.

The defendants assign errors as follows:

"1st. The Court erred in its findings of fact, in failing to find that J. P. Ellis was the tenant of Theodore Fitzpatrick.

2nd. The Court erred in failing to find that the said Ellis waived and abandoned his rights to remove the improvements from the lot in controversy, and thereby made them a part of the realty.

3rd. The Court erred in failing to find that the title or ownership of the improvements was involved in the suit for the possession of the property, brought by Fitzpatrick against Ellis in the United States Court for the Southern District of the Indian Territory, at Chickasha.

4th. The Court erred in finding that Fitzpatrick, the plaintiff in said suit, by pleading, denied his ownership of the improvements on the lot, and conceded the ownership of Ellis.

5th. The Court erred in finding that the judgment of the Court in said suit of Fitzpatrick against Ellis did not adjudge that the plaintiff was entitled to the possession of the improvements on the lot, and in finding that the ownership of the improvements was not concluded by said judgment against the claims of Ellis.

6th. The Court erred in finding that the said Ellis continued to be the owner of the improvements after Fitzpatrick had obtained a judgment admitting him to possession of the same.

7th. The Court erred in finding that the ownership of the improvements on the lot in controversy were, in no manner, involved in the litigation between Fitzpatrick and Ellis, and that the ownership of the same was, in no manner, adjudicated by the judgment of the Court in that case.

8th. The Court erred in failing to find that the refusal of Ellis to remove the improvements from the lot, they became a part of it.

9th. The Court erred in finding that Bourland and Cross, who then owned said lots, did not make any claim to the ownership of the improvements at the time the Townsite Commission was platting the town of Chickasha.

10th. The Court erred in attaching any importance to the fact that H. B. Johnson, one of the defendants herein, had made a contract with J. P. Ellis, for an easement, (the use of a privy) on the lot in controversy, as such fact, (if it be a fact) has not the remotest connection with or bearing upon the issues in this case.

522 11th. The Court erred in failing to give the judgment in the unlawful detainer case in favor of Fitzpatrick against J.



P. Ellis full faith and credit, and in failing to find such judgment was conclusive and binding on the parties, and not subject to attack by them or their privies, as to the relation of landlord and tenant, as to the unlawful holding-over of Ellis, and as to his denial and repudiation, not only of his tenant, but of the title of landlord.

12th. The Court erred in failing to find, as a matter of law, that the said judgment established conclusively the right of Fitzpatrick and his privies to the possession of the lot together with all the improvements thereon.

13th. The Court erred, as a matter of law, in holding that the ownership of said improvements on said lot, were not involved in the unlawful detainer case, and were not concluded thereby in favor of Fitzpatrick and his privies, and against J. P. Ellis and his privies.

14th. The Court erred, as a matter of law, in holding that Fitzpatrick disclaimed the ownership of the improvements on the lot by his pleading in said unlawful detainer case.

15th. The Court erred, as a matter of law, in holding that J. P. Ellis, by failing to remove the improvements from the lot, and by refusing to do so, and by setting up a right in the Forcible Entry and Detainer case to keep his improvements on the lot go with the right to the possession of the lot, had not thereby waived, abandoned and lost whatever right he had to remove the same.

16th. The Court erred in holding, as a matter of law, that J. P. Ellis was the owner of the improvements at the time the town of Chickasha was platted by the Townsite Commission.

17th. The Court erred, as a matter of law, in holding that a notice to the Townsite Commission that the lot in controversy, was in litigation, was not a notice of the Townsite Commission that the ownership of the improvements was in dispute or litigation.

18th. The Court erred in holding that after the schedule of the lot, as in litigation, the Townsite Commission had a right to schedule it to Riddle and Cook without notice to those who had succeeded Fitzpatrick's rights.

19th. The Court erred in finding that there was no fraud practiced upon the Commission by Riddle and Cook in inducing the Commission to schedule the lot in controversy to them, after it had been scheduled in litigation at the request of the vendors of these defendants. As the Commission was induced to schedule it to Riddle and Cook upon their representation that the ownership of the improvements was not in dispute, and was not in litigation, and that the improvements belonged to them, which was essentially true.

20th. The Court erred in holding, as a matter of law, that the proper interpretation of the Curtis Act gave the owners of the improvements on a lot, the preference right to purchase the same as an improved lot without regard to the manner in which such owner obtained possession of said lot from his landlord and without regard to contractual rights existing between him and his landlords, and without regard to his legal obligations to his landlord.

21st. The Court erred in holding that under the Curtis act the owner of the improvements acquired the preference right to purchase the lot as against his landlord, though his posses-



sion of the lot was wrongful, though his having his improvements on the lot at the time, was wrongful and in violation of law and contract, thus rewarding a wrongdoer, by giving him the benefits and fruits of his wrongful acts, and punishing the landlords by entailing loss upon him, because the law was not powerful enough, and the action of the court not expeditious enough to dispossess the wrongdoer before the time for the scheduling of the lot had arrived.

22nd. The Court erred in holding that the proper interpretation of the Curtis Act was to favor, uphold and reward lot jumpers and schemers, and those who violated their contracts and defied the Courts, instead of the man who obeyed the law, kept his contract, and appealed to the Court for protection.

23rd. The Court erred in holding that in the enforcement by the Townsite Commission of the Curtis Act, no inquiry could be made as to the right to purchase, beyond the bare fact of the ownership of the improvements. That this fact once established, gives the preference right to purchase the lot to such owner, however wrongful- he may have acquired the ownership, however unjust and inequitable it may be, the letter of the law must prevail over its spirit.

24th. The Court erred as a matter of law in holding that there was no trust relation arising out of the relation of landlord and tenant between Fitzpatrick and Ellis.

25th. The Court erred in holding that there was no element of fraud or wrong entering into the conduct of Ellis in reference to the lot toward his landlord, Fitzpatrick, and in holding that the wrongful denial of Ellis, that he ever rented the lot from Fitzpatrick, or in any manner became his tenant, the wrongful denial of Ellis of Fitzpatrick's right to rent the land, Ellis' wrongful assertion that he had superior right to the possession of the lot over Fitzpatrick, his ultimate use of that possession, to entirely defeat and destroy the rights of his landlord, are not in the eyes of the law, fraudulent or in violation of his trust relation.

26th. The Court erred in not holding that whatever rights to the lot Ellis acquired by reason of his possession obtained and held under Fitzpatrick, did not enure to the benefit of Fitzpatrick and were held by Ellis for him and his privies.

27th. The Court erred in holding that whatever rights Riddle obtained by reason of the issuance of the patent or deed to him to his lot, was not, under the circumstances, held by him in trust for the defendants.

28th. The Court erred in practically holding that the law of trust relations heretofore and everywhere arising between landlords and tenants, does not apply to landlord and tenant, as that relation exists in the Indian Territory.

29th. The Court erred in rendering judgment for the defendant in error, Riddle, for the title and possession of the lot.

524 30th. The Court erred in failing to render judgment for these plaintiffs in error on their cross-bill for the title and possession of said lot and adjudging F. E. Riddle to hold the legal title to said lot in trust for these petitioners.

31. The Court erred in overruling petitioner's motion for a new trial."

The provisions of the Atoka Agreement, by which the right to purchase lots in the Choctaw and Chickasaw Nations was conferred, so far as it is necessary to set them out in this case, as contained in the Curtis Bill.

(Indian Territory Stats. Sec. 57 Z 32, 30 Stat. 495.)

"It is further agreed that there shall be appointed a commission for each of the two nations. Each Commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the president of the United States. Each of said commissions shall lay out townsites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said Commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States district court for the district in which the town is located, and one with the Principal Chief or Governor of the nation in which the town is located, and one with the Secretary of the Interior, be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one half per centum of said market value within sixty days from date of notice served on him that such lot is for sale, if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to act with said commission, who is not interested in town lots, who shall act with them to determine said value."

In this action it is admitted that the legal title to the lot in controversy is in the plaintiff, and the defendants seek to have the court declare him a constructive trustee for them and decree a conveyance of the legal title from him to them.

Defendants did not own the lot or any interest therein at the time

it was scheduled by the townsite commission. Bourland and Cross had succeeded to the rights of Fitzpatrick and they transferred to the defendants, E. B. and H. B. Johnson, after it had been scheduled to Riddle and Cook. The first question for determination then is whether, irrespective of the right of Bourland — Cross, the Johnsons have any standing in court.

It is the law that a mere right to file a bill in equity to set aside a conveyance procured by fraud is not assignable. *Graham v. Railroad Company*, 102 U. S. 148; *Prosser v. Edmonds*, 1 Y. & C. 481; *French v. Shotwell*, 5 Johns Ch. (N. Y.) 555; same case affirmed 20 Johns Ch. (N. Y.) 668; *Crocker v. Belagnee*, 6 Wis. 645; *Milwaukee & M. R. Company v. M. & Western R. Company*, 20 Wis. 174; *Gruber v. Baker*, 20 Nev. 453. The reason for the rule is that to permit such an assignment would stir up litigation and encourage champerty and maintenance.

The rule, however, is not applicable in this case for the reason that Bourland and Cross conveyed more to the defendants than a mere right of action. They delivered the possession and *the* delivering the possession they could assign any other right they had. If the contention of defendant is correct that the circumstances of this case make the plaintiff a constructive trustee, that relation arose at the time the lot was scheduled, and Bourland and Cross as the cestuis que trustent had an equitable estate in the land which they could convey, and when they did convey, delivering possession at the same time, the defendants stepped into their shoes.

Where an interest in the property as distinguished from a mere right to file a bill in equity for fraud, is conveyed, the conveyance will transfer the right of action which existed in the grantor. *Dickinson v. Burrell*, L. R. 1st Eq. 337; *Traer v. Clews*, 115 U. S. 528; *Comegys v. Vasse*, 1 Peters 193; *Erwin v. United States*, 97 U. S. 392; *Whitney v. Roberts*, 22 Ill. 381; *McMahon v. Allen* 35 N. Y. 403.

Counsel on each side of this case seem to agree that the findings of the Land Department upon the facts are conclusive upon the court. And it seems to be conceded that it must appear that the Department committed error of law in awarding the lot in controversy to plaintiff before the court can interfere with its decision. This is the proper view of the law. In the case of *Johnson v. Towsley*, 13 Wall. (U. S.) 72, the court speaking by Mr. Justice Miller said:

"This court does not, and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or imposition, or mistakes, their decision on those questions is final, except as they may be reversed on appeal in that department. \* \* \* On the other hand it has constantly asserted the right of the proper courts to inquire, after the title has passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another."

It is well settled by all the authorities that the courts will not, in

527 the absence of fraud, review the findings of the land department upon questions of fact, and it is equally well settled that after the title has passed to private persons, the courts will review its decisions upon questions of law, and if it appears that through an error of law the title has been given to a person who is not entitled to hold it as against another, a court of equity will convert the holder of the legal title into a trustee of the rightful owner, and compel him to convey. *Rector v. Gibbon*, 111 U. S. 276; *Baldwin v. Stark*, 107 U. S. 463; *Leak v. Joslin*, 20 Okla. 200; *Brooks v. Garner*, 20 Okla. 236; *Thornton v. Perry*, 7 Okla. 441; *Paine v. Foster*, 9 Okla. 213; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540; *James v. Germania Iron Company*, 107 Fed. 597. It is not necessary to multiply authorities in support of propositions so well settled and not challenged by either party to this suit.

This court, therefore, while it has no right to consider the question of whether the findings of the land department on matters of fact were correct, is charged with the duty of determining whether that department committed such an error of law as will make the plaintiff in this case a constructive trustee for the defendants.

In ascertaining the rights of the parties it is necessary to go to the very foundation of their respective claims. The record does not disclose how Fitzpatrick obtained his right to the lot, but it does appear that he had some right. The first fact appearing in the record is that Fitzpatrick rented the lot to Barnhart. Under the rental contract Barnhart obtained the possession of the lot. As between Barnhart and his assigns and Fitzpatrick and his assigns, the latter had the better right to the lot. The maxim that "he has the better title who was the first in point of time." (*Broom* 260, applies to  
528 such a case.) Barnhart recognized his right by agreeing to pay him rent and agreeing to return the lot at the expiration of the time. Barnhart built a small house on the land, and after paying the rent for some time sold his interest in the premises to Ellis. Ellis added about seventy-five dollars' worth of improvements to those already on the premises, and continued to pay rent on the lot until April 1st, 1898. By renting the lot and taking possession Barnhart became the tenant of Fitzpatrick, and in his relation to Fitzpatrick was governed by the same law that applies to any tenancy. When Ellis bought from Barnhart he stepped into Barnhart's shoes and became subject to the same duties to Fitzpatrick that Barnhart had been charged with. (24 Cyc. 979, and cases cited there.) One of the duties was to restore possession at the expiration of the term. Another was to acknowledge the title by which he entered. The duties are founded upon the contract. Chief Justice Marshall in *Blight's Lessees v. Rochester*, 7 Wheaton 535, speaking of the estoppel which prevents a tenant from denying the title of his landlord, said:

"This principle originates in the relation between lessor and lessee, and so far as respects them, is well established, and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no inde-

pendent right in himself, and it is a part of the very essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another, without violating that contract by which he obtained and holds possession; and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation."

See *Arnold v. Woodard*, 4 Colo. 249; *Silvey v. Summer*, 61 Mo. 253.

In the case of *Clem v. Wilcox*, 15 Ark. 102, Mr. Justice Walker said the rule of estoppel against the tenant denying the title  
529 of the landlord,

"rests not alone on technical grounds, but is founded in convenience and sound policy, for, although the landlord may not hold a superior title to some other, yet he had the possessory title, which was of value to him and to the tenant who, by entering under him, admitted his right to the premises, and it is a breach of good faith to retain the possession of the premises and set up an adverse title to that of his landlord acquired during his tenancy."

It is true that a tenant may, even during his term, acquire an outstanding title adverse to his landlord, and after restoring possession to the landlord, he may in an appropriate action set up the title so acquired and recover upon it. Neither is he estopped to show that the landlord's title has expired or been extinguished, since the lease was executed. The estoppel ordinarily only goes to the extent of preventing the tenant from denying the title by which he entered. The numerous authorities cited in the exhaustive brief of defendants in error established this point beyond controversy.

But in this case the question is whether the tenant or his assignee may recover upon a title which he acquired directly through a breach of his contract, or whether he holds a title so acquired as trustee for his landlord. Under his contract it was his duty to surrender the premises at the expiration of his term. If he had complied with his contract he would not have been able to purchase, and thus his ability to purchase is founded directly upon his breach of contract.

It is true that there were in the Indian Territory, before the passage of the Curtis Bill, many rental and lease contracts upon town lots which were merely colorable, and in which it was not the intention of the parties that there should be a reversion in the landlord. In such contracts the person acting as landlord merely protected the so called tenant in the possession of the lot against other members of the Indian Tribe or the Tribe itself, and in such cases, whatever  
530 the words of the contract may be, the refusal of the tenant to surrender possession was no breach of the real contract of the parties.

But the contract between Fitzpatrick and Barnhart, by which the rights of subsequent grantors of both must be measured, was not of that nature. Ellis did not by his answer in the unlawful detainer

suit claim that it was of that character. And the judgment in the unlawful detainer suit must be considered as establishing that the original contract of tenancy between Fitzpatrick and Barnhart was bona fide, creating the relation that ordinarily exists between landlord and tenant, and that there was a reversion in Fitzpatrick and his grantees.

The law under which title to town lots in the Chickasaw and Choctaw Nations was obtained, is contained in the provisions of the Atoka Agreement set out in full in the statement of this case. It is contended by plaintiff that this statute gave the right of purchase to anyone owning improvements on the lot, and it is contended that it makes no difference whether the person owning the improvements has the right to the possession of the lot or not, or probably better stated, his contention is that the passage of the Curtis Bill, and ratification of the Atoka Agreement definitely conferred and fixed the right to purchase upon the person who owned the improvements at the time the lots were scheduled, and that no previous contract or dealing with the lot was relevant upon the question of the right of purchase. To this view assent cannot be given. By this legislation Congress and the Tribes meant to give the right to purchase to those who rightfully had improvements on the lot. It cannot be presumed that Congress meant to give the right of purchase to persons who wrongfully had them there. Rights in the lots, regardless of whether

or not they had substantial and valuable improvements, were always recognized and sustained by the courts of the Indian Territory. The case of Walker Trading Company v. Grady Trading Company, 39 S. W. 354, decided by the Indian Territory Court of Appeals in January, 1897, held that a corporation could collect rent from a tenant upon its improvements, though it did not own the land, and though the law of the Choctaw Nation passed in 1887 required all persons, not Indians, owning rent houses to dispose of them in sixty days under penalty of having them seized and sold. At the same time it was decided in Kelly v. Johnson, 39 S. W. 352, that a citizen of the United States who was in possession of a lot in a town in the Choctaw Nation, around most of which he had a fence, could recover the possession of the lot in a forcible entry suit from a member of that nation, who broke down the fence and took possession. In the case of Tye v. Chickasha Town. Company, 48 S. W. 1021, in which the plaintiff in this case represented the prevailing party, decided in January 1899, it was held that a transfer of a vacant, unimproved lot by the corporation to a person not an Indian, was a sufficient consideration for a note given for the purchase price.

In addition to these cases, the case of Williams v. Works, 76 S. W. 246; Fraer v. Washington, 60 C. C. A. 194; and the unlawful detainer branch of this case, Ellis v. Fitzpatrick, 64 S. W. 567, 55 C. C. A. 260, as well as numerous decisions by the nisi prius courts established the rule that contracts with reference to lots, the title to which was in the tribes, were valid, and the possession of such lots must be respected. It would have been impossible to build towns in the Indian Territory had the rule been otherwise. Considerable towns were built up and considerable money invested upon the faith



of mere possessory rights, such as Fitzpatrick appears to have had in this case, and those rights were always respected by the law abiding elements of the community. If the unimproved lots had been considered open to any taker, the lot jumper, and people willing  
532 to maintain possession by force, would have been the only ones that would have gone into towns, and towns are not built by that kind of people. Very few men will build in a place where the prospective builder must sleep on his lot, and on his arms until he can place substantial improvements on the property. Then the disposition of most men in those times was to want some one between them and the tribes in the chain of title. The custom was for some person to get peaceable possession of the townsite and sell and rent the land just as if he owned it. While he was not usually a very popular person in the community, still the rights which had their inception in him were the foundation upon which the town rested. In fact the procedure in building the towns was exactly the same that prevailed in other parts of the United States, where the settlement of the country preceded the formal opening by the government.

The case of *Lamb v. Davenport*, 18 Wall. 307, involved the validity of contracts made by Lamb and business associates, for the conveyance of lots in what was afterwards the city of Portland, Oregon, and the right of purchasers from Lamb and his associates to compel the heirs of Lamb to convey the title to the lots so sold to them, Lamb having died before he received title from the government. In deciding that the purchasers could require the heirs of Lamb to make the conveyance, Mr. Justice Miller, who delivered the opinion of the court said:

"It is not necessary to recite in this opinion all of those transactions. It is sufficient here to say that several years before the act was passed, and before any Act of Congress existed, by which title to the land could be acquired, settlement on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known and undisputed. But it was equally well known that these possessory rights and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right  
533 to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious, actual settlers, who were the pioneers of emigration in the new Territories, gave a decided and well-understood value to those claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, sub-



ject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the titles, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts.

The contract between Barnhart and Fitzpatrick was valid between them and their respective assigns prior to the making of the Atoka Agreement, and remained valid notwithstanding that agreement. The principles that protected possessory rights required greater force after the Atoka Agreement was made. That agreement segregated the townsites. The lots in them were to be sold, and it was to the interest of the tribes, and of the government as to the guardian or trustee of the tribes, to make the lots as valuable as possible, and the only way to increase their value was to encourage the towns to build up. To encourage the buildings of towns it was necessary to recognize and protect the possessory right to the lots. It was not the intention of Congress or the Tribes, by the Atoka Agreement, to strike down all existing contracts with reference to lands, and so the courts held. The Circuit Court of Appeals, in the course of its decision of the unlawful detainer suit brought — Fitzpatrick and Ellis (55 C. C. A. 260), said:

"The United States Court of Appeals in the Indian Territory decided (*Ellis v. Fitzpatrick*, 64 S. W. 567) that there was no merit in the defendant's contention, that the Atoka Agreement, so termed (vide 30 Stat. 495; 500, C. 517), annulled all leases between white men of town lots in the Choctaw and Chickasaw Nations. It also said in substance that, if the act in question had any effect on such contracts, its effect was rather to validate them, in that it recognized the validity of such holdings by white men in towns and villages, and provided a means for the transference of the legal title, thereby removing any objection which might heretofore have been urged against the validity of such contracts between white men. We are of the opinion that this was a correct view of the act in question, and that nothing therein contained can be held to justify the contention that Ellis was entitled to challenge his landlord's title because it was not alleged that permanent improvements had been erected on the demised premises."

See also *W. O. Whitney Lbr. & Grain Co. v. Crabtree*, 104 S. W. 32.

In the case of *Fraer v. Washington*, 60 C. C. A. 194; 125 Fed. 30, Washington, a Chickasaw Indian, leased a lot in Marietta to Fraer, a citizen of the United States. The lease was executed on the 1st of January, 1898 for a term of one year, with the privilege of renewal for an additional year, and contained a provision that before he was entitled to the possession, the lessor should pay to the lessee the value of the improvements which the lessee had made on the demised premises. The complaint in unlawful detainer alleged that Fraer had made seven hundred dollars' worth of improvements on the land, and that Washington had tendered him therefor the sum of eight hundred dollars prior to the bringing of the suit. There was a verdict for plaintiff, and judgment that he recover possession,

and that the money which he had paid into court for the improvements should be paid to Fraer. Fraer appealed and the case was affirmed in the Court of Appeals for the Indian Territory. Fraer appealed from that Court to the Circuit Court of Appeals for the Eighth Circuit, and upon appeal to that court, contended that the act of Congress approved July 28th, 1908, known as the Curtis Bill operated to destroy all of the lessor's contractual rights under the lease, and to extinguish his interest, possessory or otherwise, that he had in the demised premises when the lease was executed. The Court said:

"By accepting the lease and entering thereunder as a tenant of the lessor, he certainly admitted the lessor's right of occupancy and according to well established rules of law, should be estopped from denying it or challenging the lessor's power to make the lease. We fail to perceive upon what ground the Curtis Act can be said  
535 to have released the lessee from his promise to surrender the possession of the demised premises to the lessor at the end of his term, pursuant to his agreement. The act contains no express provisions that tenants, who had made improvements on leased property, should be so released from their engagements, and we are not inclined to insert such a provision by construction. It is true that the act concedes to the owner of improvements upon any townsite lot the preference right to purchase the lot after the townsite has been surveyed and platted, and the lots have been appraised, on making certain specified payments within a certain period; but it does not appear in the present instance that any of these acts have been done, or that the time has arrived when a purchase can be effected. \* \* \* It is certain, we think, that Congress did not intend that white men who had obtained temporary possession of townsite lots or land in the Indian Territory from Indians by means of leases, should make use of the possession acquired to secure a fee simple title to the demised property to the exclusion of Indian lessors to whom they had covenanted to restore possession."

As already stated, the Atoka Agreement reserved townsites from allotment, and no reason is perceived why the reasoning of the court to the effect that it was not the intention of Congress that white men, who obtained temporary possession of lots by means of leases, should make use of such possession to secure a fee simple title to the exclusion of Indian lessors, should not also apply in favor of white lessors. So far as title to the land was concerned, townsites ceased to be Indian lands when segregated from allotment, and the question of blood of the lessor cannot enter into the case. The only interest Indians had in townsites greater, than white men in lawful possession, was to receive the price the lots brought when sold by the government.

An act of Congress of September 4th, 1841, which had for its object the settlement of certain lands in the Northwest, the Indian title to which had been extinguished, reserved from settlement public lands that had been selected as the site for a city or town. Another act for the relief of citizens of towns in the same section of the coun-

try, and as supplementary to the former act, provided for the town authorities, or the judges of the county court where the town was not incorporated,

"to enter at the proper land office and at the minimum price the lands so settled and occupied in trust, for the several use and benefit of the occupants thereof, according to their respective interests."

536 The legislature of the state of California, within which state the land was situated, provided:

"That the evidence required to establish any claim to any lot, or lots, or parcels of land in said county, under the provisions of this act, shall be that the claimant thereof is a citizen of the United States, or has declared his intention of becoming such previous to the filing of his claim, as hereinbefore provided, and is a resident of said county and that the claimant was one of the original occupants and locators of such town, or holds his right to such lot or lots or parcels of land from such original occupant or locator, or his assign; provided no right to any unimproved lot or lots or parcels of land as last above mentioned, acquired after the passage of the act to which this amendatory, shall be respected unless the person from whom the same be acquired be at the time a resident of said county; and provided further, that no person or persons who have not been in peaceable possession of any lot or lots or parcels of land in such town for one year next preceding the passage of the act, to which this is amendatory, and has improved the same shall be deemed to have prior right to said lot or parcels of land."

This act of the legislature was attacked upon the ground that by this act of Congress the land must have been entered by the corporate authorities or the county judge "in trust for the several use and benefit of the occupants thereof, according to their respective interests." In holding the act constitutional, the great Stephen J. Field, who was at that time on the Supreme Bench of California, said:

"This provision does not establish that it was the intention of Congress to give the benefits of the entry to mere temporary occupants of particular tracts at the date of the entry, without reference to the character of their occupancy, and thereby in many instances deprive the original bona fide settlers of the premises and improvements in favor of those who had by force or otherwise intruded upon their settlement. Were such the effect of the provision in question, the trespassers of yesterday, or the tenant of today, would often be in a better position than parties, who by their previous occupation and industry have built up a town and made property valuable."

Ricks v. Reed, 19 Cal., 551.

In the case of Rector v. Gibbons, III U. S. 276, some times known as the "Hot Springs Case," the facts of which will not be

537 stated, as it is presumed that the profession is familiar with the case, the court said:

"The act of 1877 embraces, therefore, under the designation of claimants and occupants, those who had made improvements, or

claimed possession under an assertion of title or a right of pre-emption by reason of their location and settlement. It was for their benefit that the act was passed in order that they should not entirely forfeit their claims from location or settlement, and their improvements, but should have, except as to the portions reserved, the right of purchase. Parties succeeding by operation of law or by conveyance, to the possession of such claimants and occupants would succeed also to their rights, but lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stands in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease. They, therefore, whilst retaining possession, are estopped to deny his right. *Blight's Lessee v. Rochester, 7 Wheat. 533.* This rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment. The lessees in this case and those deriving their interests under them, therefore, claim nothing against the plaintiff by virtue either of their possession, for it was in law his possession, or of their improvements, for they were in law his improvements, and entitled him to all the benefits they conferred, whether by pre-emption or otherwise. Whatever the lessees and those under them did by way of improvements on the leased premises inured to his benefit as absolutely and as effectively as though done by himself."

This statement of the law, while not an authority on the facts of the present case as to the ownership of the improvements, is authority for the proposition that a tenant, while in possession under his lease, cannot take any step or do any act which will deprive the landlord of the title by which the defendant entered. Further, the court said:

"Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon; and not those who by violence or fraud or breaches of contract intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this  
538 respect in the whole legislation of the country a consistent observance of the rules of natural right and justice. \* \* \*

In no instance in the legislation of the country have the claims of an intruder upon the prior possessions of others, or in disregard of their rights, been sustained. Laborers occupying mining claims, or agricultural lands, whilst working for the first appropriator or settler, acquired no pre-emptive rights over him to such claims or lands; nor did any permissive occupation under him, as tenant or otherwise, impair his rights. To construe the act of 1877 so as to give to lessees a better right than their landlord to purchase the land on which he had been in occupation more than a third of a century, would be to require us to attribute to Congress not only the intention to do him a flagrant injustice, but to depart from its previous uniform and long

settled policy to protect the pioneer and original settler upon the public domain."

See *Goode v. Gaines*, 145 U. S. 141; also *Trenouth v. San Francisco*, 100 U. S. 251; where it was held that a person cannot by a trespass initiate a preemption right to public land. See also *Butterfield v. Nogales Copper Company (Ariz.)*, 80 Pac. 345.

Aside from the proposition that the act should be construed so as to uphold rather than to destroy contracts, a literal construction of the terms of the agreement did not give Ellis a right to purchase the lot. The agreement provided that,

"When said towns are so laid out each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses have been made, shall be valued by the commission provided for the nation in which the town is located, at the price a fee simple title to the same would bring on the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value," etc.

It will be observed that to have the right to buy at the reduced price the purchaser must have been the owner of the improvements, and the improvements must have been permanent, substantial and valuable. Ellis's improvements were substantial and valuable, but they were not permanent. At least, they were not permanent as to that

lot because it was his duty to get off the lot and to take the

539 property off. See *Whitney Lbr. & Grain Co. v. Crabtree*,

166 Fed. 738. Webster defines "permanent" as follows:

"Continuing in the same state, or without any change that destroys form or character; remaining unaltered or unremoved; abiding; durable; fixed; stable; lasting; as a permanent impression." And gives as synonyms, "Lasting; durable; constant." If the house put there by Barnhart must have been moved, then it was not permanent.

The makers of the agreement undoubtedly meant to give the word "permanent" its ordinary meaning. If not it would have been sufficient to have said "substantial and valuable." But more was necessary and the other ingredient was permanency. Ellis had no permanent improvement on the lot, though he had a substantial and valuable house there. In fact it may well be doubted whether a house or other building on land is an improvement at all, unless it becomes part of the land and is owned by the same title as the land. Webster defines "improvements" as "valuable additions or betterments, as buildings, cleanings, drains, fences, etc., or betterments, as buildings cleanings, drains, fences, etc., on premises." The very term seems to import something added to or becoming a part of the land. See *Simpson v. Robinson*, 37 Ark. 132; *Bates v. Harte*, 124 Ala. 427; *Hoppes v. Baie*, 105 Iowa, 648; *Johnson v. Gresham*, 35 Ky., 542.

It must be decided then, in the light of the circumstances, and the decisions, that Fitzpatrick had rights in the lot, and that his rights were not destroyed by the Atoka Agreement. He had the

right to the possession of the lot at the time the unlawful detainer suit was brought, and he had that right at the time the townsite commission came to Chickasha for the purpose of scheduling the lot.

While the technical title began when the lots were scheduled to the persons claiming the right to buy, yet the manner of the previous holding of the lot entered into and formed the basis of  
540 foundation for the title that was consummated or completed by the purchase.

It must be further decided that though Ellis owned the improvements he did not own them as adjunct to or appurtenant to the lot. Not so owning them their presence upon the lot gave him no right to purchase it, and the Department committed error in conveying the lot to him.

It cannot be the law that a tenant having possession subject to his landlord, and under an agreement to surrender that possession, can use that possession as a basis or foundation upon which to build up a title in opposition to that of his landlord. No claim can be upheld in a court of equity which has for its basis a flagrant breach of contract. No case has been cited and it is not believed that any can be found sustaining such a contention.

The next question to be determined is whether Johnson can enforce a trust against Ellis or his assignee. It is contended that though it may be Ellis had no right to purchase the lot, that no one but the Indian Nations or the Government can question his right to the lot, and Fitzpatrick and his assigns cannot do so, because they never, at any time prior to obtaining possession under the writ of possession issued upon the judgment in the unlawful detainer suit, had any improvements upon the lot, and hence were never within the terms of the Atoka Agreement giving the right of purchase only to those having permanent, substantial and valuable improvements upon the lot. This is the most difficult question in the case.

To sustain this view though it would be necessary to hold that Ellis can retain an advantage he obtained by a breach of his contract. It has been shown that that contract was not abrogated by the adoption of the Atoka Agreement.

While this is a case arising out of the relation of landlord and tenant, it is not peculiar to that relation. It involves the inviolability of a valid contract. The principle is akin to the maxim that

541 "No one can take advantage of his own wrong." It has various applications. In the case of Klug v. Sheriffs (Wis.)

109 N. W. 656, 7 L. R. A. (N. S.) 362, Klug, an artist, contracted with Sheriffs to paint a portrait of his deceased wife, and to enable him to make a likeness furnished him two photographs of her, one taken out doors and the other indoors. Klug made the painting agreed upon, and after delivering it wrote Sheriffs that he had made another painting and Sheriffs wrote him to take it to his house. Sheriffs refused to return it or to pay for it. The court upheld him in this course. After discussing without expressly deciding the question of the "right of privacy" involved, Mr. Justice Kerwin said:

chase.



"Under the contract plaintiff had no right to hold the photographs or use them for any other purpose than to aid him in painting the original picture."

And he decided that Klug could not acquire any property in the picture thus painted in violation of his contract. In this case but for his possession Ellis could not have obtained title to the lot. His possession was wrongful. Therefore, he must yield the fruits of his wrongful act to the person rightfully entitled to the possession. When he used his possession to secure the title adverse to Fitzpatrick, he became a constructive trustee for Fitzpatrick, and he and his assigns hold the title as constructive trustees for Fitzpatrick and his assigns.

In Rushworth's case, Freeman 12, 22 Eng. Reprint 1026, a mortgage was given on a lease and the mortgage renewed the lease. It was held that the renewal was for the benefit of the mortgagor. Lord Nottingham said "the mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit." See Hunt v. Patchin, 35 Fed. 816.

A case very much like the present was Waggoner v. McLaughlin, 33 Ark. 195. In that case land which was occupied by McLaughlin as tenant of a receiver was forfeited for non-payment of taxes. McLaughlin applied to the Auditor of the State to purchase the land, under the provisions of the Arkansas law by which citizens or heads of families and actual settlers upon the land forfeited to the state for taxes, were authorized to purchase the same. The court held that the title so obtained was not good, and that McLaughlin held it as trustee for the owner. Mr. Justice Eakin, in the course of his opinion, said:

"But they availed themselves of a possession which they held as tenants, as a basis to acquire title as actual settlers, which no one else under the circumstances could have acquired against them. They had no right to make use of a possession thus acquired, to found upon it a claim hostile to the landlord. If they had intended that, they should have restored possession, that the landlord might be free to contest the validity of the forfeiture to the State, and have the advantage of possession.

When they purchased from the State, under the circumstances, they became constructive trustees for the benefit of the owners of the property, and subject to the control of the court with regard to said property, as fully as when they held under it as tenants."

See also Cleavinger v. Reimar, 3 Watts. & S. (Pa.) 486.

From the date of the filing of the unlawful detainer suit more than three years elapsed before the lots were scheduled to Ellis. During all that time Fitzpatrick and his assigns had the right to the possession, and if possession had been surrendered to them they could have placed improvements on the lot before it was scheduled. The improvements necessary to give a right to purchase were not limited to those on lots at the date of the ratification of the Atoka Agreement. Improvements placed on the lands any time before the lots were scheduled were sufficient to confer the right to purchase. When Fitzpatrick brought the unlawful detainer suit he



alleged that he wanted possession in order to improve the lot. It appears that his assigns made an effort to get an injunction allowing them to enter during the pendency of the appeal in that case, so that they could improve the lot. There is, therefore, every probability that they would have improved the lot had Ellis complied with his contract by delivering the possession of the property. Having remained in and gotten the title, Ellis and his assigns held it for Fitzpatrick and his assigns.

543 The case of *Angle v. C. St. Minn. & Omaha R. Company*, 151 U. S. 1, was a bill in equity filed by the administrator of Angle to subject certain lands of the Company to the payment of a judgment her intestate had recovered against the Portage R. Company. The State of Wisconsin had granted a certain tract of land to the Portage Company to compensate it for building a railroad. The Portage Company began construction of the road and contracted with Angle to build sixty five miles of the line. Angle went to work and had sixteen hundred men at work building the road when the officers of the Omaha Company, by bribing certain officers of the Portage Company, obtained control of the capital stock. The Omaha Company then, through its officers, advertised the Portage Company as being hopelessly insolvent, stopped the work and prevented Angle from completing his contract. It also, by representations as to the solvency of the Portage Company induced the Legislature of Wisconsin to pass an act revoking the land grant to the Portage Company, and grant the same land to the Omaha Company. The Omaha Company built the road and received the land. It was held by the Supreme Court of the United States that upon these facts Angle was entitled to have the land subjected to his judgment against the Portage Company. Mr. Justice Brewer said:

"That this was wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defence were tolerated it would also be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the Company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed, even if no interference had been had, and that, therefore, there being no certainty of the loss there is no liability."

544 It does not lie in the mouth of the wrongdoer in this case, or his assigns with notice, to say that Fitzpatrick and his assigns had no improvements on the lot, when their wrongful acts prevented him from placing them there. It is not possible to escape the conclusion that by the wrongful acts of Ellis and his assigns in keeping Fitz-

patrick and his assigns out of possession, and in obtaining title they have raised a constructive trust in favor of the defendants assigns of Fitzpatrick.

It is contended by plaintiff that the rental contract from Ellis to H. B. Johnson was such an admission of title in Ellis as estops the defendants from setting up any interest in the lot against the assignee of Ellis. It would have estopped them from setting up any right which they acquired by virtue of the possession obtained under the contract. But they are not claiming in that way. The term provided for in that contract had expired before defendants purchased from Bourland and Cross, and Bourland and Cross had obtained possession of the lot under the judgment of the Circuit Court of Appeals. After their landlord had been ejected, the Johnsons could, notwithstanding their lease contract, purchase the title of the true owner. *Wilds' Lessees v. Serpell*, 10 Grat. (Va.) 405; *St. John v. Quitzow*, 72 Ill. 334; *Arnold v. Woodard*, 14 Colo. 164.

Plaintiff contends that the relation of landlord and tenant ceased between Ellis and Fitzpatrick, and that the defendants cannot claim the benefit of an estoppel which existed only in favor of the landlord. The relation of landlord and tenant continued until Bourland and Cross regained the possession of the premises. *Peyton v. Stith*, 5 Peters 485; *Juneman v. Franklin*, 67 Tex. 411; *Sittel v. Wright*, 58 C. C. A. 416; 122 Fed. 434. At that time the lot had been scheduled to Cook and Riddle, and Bourland and Cross had an equitable estate which they could and did sell to defendants.

545 It is impossible, without making this opinion, already too long, interminable, to review the decisions cited by the plaintiff. But all of them seem to be reconcilable with the doctrines already laid down. The case of *Hutchings v. Low*, 15 Wall. 77, decided merely the fact that a man — had settled on land and declared his intention to pre-empt it, obtained thereby no such vested right as would prevent the government from withdrawing the land from settlement. In the course of the decision in that case the court said:

"The whole difficulty in the argument of defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him, as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell."

To the same effect are *Frisbie v. Whitney*, 9 Wall. 187, and other cases cited by plaintiff. The present case falls within the second class mentioned in *Hutchings v. Low*, where the defendants have acquired a legal right as against other parties to be preferred when the Tribe sold the lot.

The case of *Gonzales v. French*, 164 U. S. 338, holds merely that the action of the Department could not be disturbed, except for fraud or error of law. And further, that the fact that the claimant

had settled on the land did not prevent the United States from reserving it as school land where she had not filed her declaratory statement, or make an actual entry at the land office. The case of *Campbell v. Weyerhaeuser*, 88 C. C. A. 412, 161 Fed. 332, held that one who has never by acceptance of a grant, or by settlement and improvement or by occupation, or by entry, or by payment placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor. And the court said in that case,

"The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder, is not, and no one can convert it into, such an interest in land by making an application to purchase, which the officers of the land department unlawfully deny."

In that case there was no privity either between the government and the plaintiff, or between the plaintiff and the defendant. The companion case of *Hoyt v. Weyerhaeuser*, 88 C. C. A. 404, holds that where there has been an error of law committed by the land department, the court has a right to charge the legal title held under the patent with a trust in favor of the person rightfully entitled.

The case of *Ross v. Stewart*, 25 Okla. 611, decided that a person, who had not exhausted his remedy in endeavoring to get the land department to convey to him, could not invoke the assistance of the court. *Brennan v. Shanks*, 24 Okla. 563 decided that the right to have the holder of the legal title declared a trustee for the equitable owner could not be plead as a defense to an action of forcible entry and detainer.

The fact that the lot was first marked as in litigation, and that plaintiff procured that marking to be changed and the lot to be scheduled to him, has very little bearing in the case. The fact that the attorney for Bourland and Cross appeared before the townsite commission indicates that they were at that time claiming it. Without passing upon the propriety of plaintiff's conduct in having the marking changed without notice to the opposite party, it is sufficient to say that the Department opened the case and heard the contest, so that the case is now presumably in the same attitude it would have been had Bourland and Cross had notice of the application to schedule the lot to Cook and Riddle.

The evidence shows that plaintiff had improvements on the lot of the value of two hundred and twenty-five dollars, and that he paid the sum of three hundred and seventy-five dollars to extinguish the title of the Choctaw and Chickasaw Nations. He is entitled to be re-imbursed for these amounts, with interest on the value of the improvements from the 1st of February, 1903, at the rate of six per cent. per annum, and with interest on the amount paid for the lot at the same rate from June 19th, 1902.

That the questions presented in this case are perplexing cannot be denied. But their decision made herein appears to be most in accord with the fundamental principles of law. There yet remains one great tribunal to which resort can be had. It is not likely that

the tenacity of purpose and determination to prevail, which has been manifested by all the parties during more than thirteen years of litigation, will in the slightest degree relax until they have met at the bar of that court, and there received the decision that will finally end the controversy.

The case should be reversed and a decree and judgment here rendered, declaring that plaintiff Riddle holds the lot as a constructive trustee for defendants, E. B. and H. B. Johnson, and requiring him to execute a conveyance of said lot within sixty days after the mandate in this case shall be filed in the District Court of Carter County, and providing that upon his failure to so execute a conveyance that said decree and judgment shall operate and have the effect of such conveyance.

By the COURT: Adopted in whole.

Nov. 28, 1911.

Hayes, J., not participating.

548 *Supreme Court Proceedings.*

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. H. and H. B. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this Dec. 8 1911 it is ordered by the court that the mandate of this court in the above cause be stayed.

TURNER, C. J.

549 Supreme Court, January Term, 1912, January 9th, 1912,  
First Judicial Day.

No. 1190.

F. H. & H. B. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this day, it is ordered by the court, that the request herein that the motion for a rehearing in the above cause be heard before the Supreme Court instead of before Supreme Court Division No. 2, be, and the same is hereby overruled.

550 Supreme Court, September Term, 1912, September 10, 1912,  
First Judicial Day.

No. 1190.

E. H. & H. B. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this day it is ordered by the court that the petition for rehearing filed in the above entitled cause be, and the same is hereby granted and the cause is set for submission with privilege of oral argument on September 23, 1912.

551 Supreme Court September Term, 1912, September 23, 1912,  
Tenth Judicial Day.

No. 1190.

E. B. & H. E. JOHNSON, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this day it is ordered by the Court that — be, and the same is hereby continued until such time as is convenient for counsel of both parties.

552 Supreme Court, January Term, 1914, February 10th, 1914,  
Fifteenth Judicial Day.

No. 1190.

E. B. JOHNSON et al., Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed. Opinion by Brewer, C.

By the COURT: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

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(Filed Feb. 10, 1914.)

In the Supreme Court of the State of Oklahoma, Supreme Court  
Commission, Division No. Two.

No. 1190.

E. B. and H. B. JOHNSON and THE FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

v.

F. E. RIDDLE, Defendant in Error.

*Syllabus.*

1. A town site commission for the Chickasaw Nation, appointed and acting under the provisions of the Act of Congress of June 28, 1898 (30 Stat. L. 495) had power and jurisdiction to decide contests between conflicting claimants of a preference right to purchase a town lot; and upon the abolition of the commission its powers and jurisdiction were transferred to the United States Indian Inspector for Indian Territory.
2. It is well settled that, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or because of a gross or fraudulent mistake of the facts, the rightful claimant has a remedy, and may avoid the decision of the Land Department and charge the legal title of the patentee with his equitable right to it, either upon the ground that, upon the facts found, conceded, or established, without dispute, at the final hearing before the Department, its officers fell into a clear error in the construction of the law applicable to the case, which caused them to issue the patent to the wrong party, or that, through fraud or gross mistake, they fell into a misapprehension of the facts proved before them, which had the like effect.
3. In a suit to enforce such a remedy however, all reasonable presumptions must be indulged in support of the officers intrusted by the law with the proceedings resulting in the patent.
4. A town site commission for the Chickasaw Nation acting under authority of the "Atoka Agreement" which is embraced in an Act of Congress approved June 28, 1898 (30 Stat. L. 495) and which provides:—"When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary houses, have been made, shall be valued by the commission \* \* \* the owners of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value, \* \* \* etc."), is under the duty, when two persons appear and contest for the preference right to purchase a lot, to decide two things; first, are the improvements on the lot sufficient under

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the law to entitle it to be listed as an improved lot; second, if so, which of the contesting claimants, owns the improvements situated on the lot. And, having determined these questions, it is under the duty of awarding to the owner of such improvements the preference right to purchase the lot; and this regardless of any question of former possession, or previous holding of the lot raised by the parties that does not involve the ownership of the improvements.

5. An unlawful detainer suit brought in Indian Territory, under the provisions of the laws of Arkansas, (Mansfield's Digest, Chap. 67, Sec. 3365) in force there, was purely a proceeding at law, involving in no way the equitable jurisdiction of the court, or the title to the property. Such suit related solely to the question of possession.

Error from the District Court of Carter County.

S. H. Russell, Trial Judge.

Affirmed.

Bond & Melton, C. C. Potter, Attorneys for Plaintiffs in Error.

W. A. Ledbetter, A. C. Cruce, C. B. Stuart, Attorneys for Defendant in Error.

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*Opinion by Brewer, C.*

This is a suit in ejectment brought to recover lot three (3) block forty-six (46) in the City of Chickasha, by F. E. Riddle, the holder of the legal title thereto under a deed issued to him under the town-site laws applicable to the Choctaw and Chickasaw Nations, against E. R. & H. B. Johnson and the First National Bank Building Co., and others.

The defendants admit the legal title to be in Riddle but, by cross petition, seek to have the court declare him a constructive trustee, holding the legal title for their use and benefit, and to decree a conveyance of title from him to them. The District Court of Carter County, refused to declare a trust, and awarded judgment to Riddle for the lot. From this judgment the defendants bring error.

In 1892, one Fitzpatrick, a citizen of the United States, without membership in any Indian Tribe or Nation, or of any rights which might flow from such tribal membership, made a contract with one Barnhart, relative to the lot in controversy, the same being at the time a vacant unimproved lot, by which contract Barnhart went into possession of the lot and erected thereon a substantial but inexpensive house and other improvements, which were to belong to him; but he was to pay a small ground rent to Fitzpatrick. It is not attempted to be shown in the record what right Fitzpatrick claimed, or that in fact, he had any right, to seize upon vacant tribal



lands, and contract concerning them as he did. In 1897, 556 Barnhart sold the improvements on the lot, and transferred the possession to one Ellis, who went into possession and further improved it. Barnhart had paid ground rent, and Ellis after he went into possession made some payments of money to Fitzpatrick which may be treated as ground rent, but which in the contest later before the Department, Ellis claimed had been paid not as rent, but for other purposes. It is certain that about April 1st, 1898, Ellis refused to pay rent, and on July 7th, 1898, Fitzpatrick brought an unlawful detainer suit against Ellis in the United States Court for the Southern District of Indian Territory, alleging, in addition to the usual averments in such petition, that he desired possession for the purpose of being able to place thereon such improvements as would give him under the townsite laws, then enacted, the preference right to purchase the lot. After bringing the suit April 8th, 1899, Fitzpatrick conveyed any right he had to Ella Cross, who in turn conveyed a one half interest to one Bourland on Sept. 10th, 1900.

Fitzpatrick prevailed in the unlawful detainer suit in the U. S. Court; also, on appeal, in the Indian Territory Court of Appeals; (Ellis v. Fitzpatrick 64 S. W. 567) also in the Eighth Circuit Court of Appeals by a decision given Oct. 27, 1902 (55 C. C. A. 260). In the meantime, Ellis retained possession of the lot through a super-seedeas bond.

On February 8th, 1902, the townsite commission for the Chickasaw Nation, organized pursuant to the provisions of what has been usually called the "Atoka Agreement" (Act June 28th, 557 1898; 30 Stat. L. 495) proceeded to Chickasha, for the purpose of scheduling town lots to those possessing the preference right to purchase same, under the law. This being prior to the final decision in the unlawful detainer suit, a clerk in the townsite office marked the lot in litigation on the tentative schedule. On March 26, 1902, Ellis conveyed his rights to Riddle and Mat Cook, and on the same day Riddle appeared before the agent in charge of the townsite schedule and produced his bill of sale to the improvements, and represented that while the possession of the lot was in litigation in the unlawful detainer suit, that the improvements on the lot, and the ownership thereof, were not in litigation; thereupon the lot was scheduled to Riddle and Cook, who were later, on June 12, 1902, notified that they had the preference right, under the law, to purchase the lot. They availed themselves of this right on June 19, 1902, by paying to the United States Indian Agent the full sum required under the law and the appraisal placed on the lot. On Sept. 26, 1902, Bourland and Cross as claimants under Fitzpatrick, protested by letter to the Townsite Commission, and seem to have continued the correspondence until July 31st, 1903. When H. B. Johnson, who in the meantime had purchased the Fitzpatrick claim, also deposited the purchase price of the lot with the United States Indian Agent.

On January 1st, 1902, before the Johnsons had purchased, or claimed any interest in the lot, H. B. Johnson, who it appears owned or was interested in an adjoining lot entered into the following agreement with Ellis:

558 "INDIAN TERRITORY,  
Southern District:

This agreement made and entered into on this day by and between J. P. Ellis, party of the first part and H. B. Johnson, party of the second part. Witnesseth: That the party of the second part being desirous of using the rear end of lot number three in block forty-six, owned by the party of the first part, and he hereby agrees to erect good, substantial water closets, and to fence the same in with a good board fence, and to be paid for the use and rent of said premises. It is especially agreed that said improvements so erected shall be owned by and be the property of the first party to be used by him and his tenants for water closet purposes and as a back yard, for a term of 12 months, and until the same are paid for in full, subject to the provisions hereafter mentioned, in case party of the first part should not be compelled to use the same after the expiration of first 12 months and in that case he shall pay party of the second part the cost of said improvements less the use of the same for said 12 months which is agreed upon to be at the rate of one dollar per month. It is agreed that the tenants of party of first part shall have privilege of using one of said closets, so long as they do so without molesting party of the second part and his tenants by using same in such a way as to interfere with said second party and tenants. In case any disagreements should arise, and not settled satisfactory by said parties otherwise, then said party shall have the right of paying the said second party the full cost of said improvements and take full possession of same. Witness our hands this January 1st, 1902.

J. P. ELLIS,  
H. B. JOHNSON."

In January, 1903, Bourland and Cross obtained possession of the lot, and on Feb'y 3rd, 1903, Riddle and Cook instituted this suit in ejectment. On May 25th, 1903, the Johnsons bought the claims of Bourland and Cross, and were later made defendants together with the First National Bank Building Co. These new defendants filed answer and cross petition reciting all the previous litigation and the various transactions herein mentioned. Their vendors, Bourland and Cross, were engaged in a contest proceeding, when the Johnsons bought them out, before the townsite commission relative to the award and scheduling of the lot, which was, on

559 Oct. 1st, 1906, decided against them and in favor of Riddle and Cook, by J. George Wright, U. S. Indian Inspector. Voluminous evidence was introduced and all the facts relative to the history of the lot, its possession, improvements, and the litigation in which it had been involved were fully and minutely gone into and considered by the inspector. The inspector found that Riddle and Cook were the owners of the improvements on the lot, and that they were permanent and substantial as required by the townsite law, and were such as would entitle such owners to have scheduled in their name, with the preference right to purchase, the lot on which they stood; and that, by virtue of their

ownership of the improvements, Riddle and Cook were entitled under the law to the preference right to purchase the lot, and to obtain title upon payment of the purchase price. The decision noted all the facts herein mentioned, and all the findings were in favor of Riddle and Cook, with a particular finding, that under the evidence the charge of fraud made in regard to the scheduling of the lot "was not entitled to serious consideration."

An appeal was taken from the decision of the Inspector to the Commissioner of Indian Affairs, and there affirmed in an opinion. From thence it was taken before the Secretary of the Interior and again affirmed in an opinion. It was then reviewed by an Assistant Attorney General who concurred in the decision of the Department. Patent was finally issued to Riddle and Cook, May 1907. Riddle in the meantime bought Cook's interest, and declared same in additional pleadings. While the unlawful detainer suit was pending, Bourland & Cross tried, by an injunction suit, to get possession of the lot for the purpose of improving

560 it so as to qualify for preference right to purchase. They were refused the relief and the judgment became final. After the unlawful detainer suit was decided in their favor, Bourland & Cross, brought suit upon the bond under which Riddle's predecessor had retained possession, but it was determined in that suit that plaintiffs were not the owners of the improvements on the lot, and that Riddle's predecessor in interest was such owner. This judgment became final.

"The provisions of the Atoka Agreement, by which the right to purchase lots in the Choctaw and Chickasaw Nations was conferred, so far as it is necessary to set them out in this case, as contained in the Curtis Bill, (Act Congress June 28, 1898, 30 U. S. Stat. L. 495) follows: 'It is further agreed that there shall be appointed a commission for each of the two Nations. Each Commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the president of the United States. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States district court for the district in which the town is located, and one with the Principal Chief or Governor of the nation in which the town is located and one with the secretary of the interior, be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial and valuable improvements other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have

the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty two and one half per centum of said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchase the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and

561 when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to set with said commission, who is not interested in town lots, who shall act with them to determine said value.' "

After the passage of the Act of Congress of March 3rd, 1905 (33 Stat. L. 1048-1059, Chap. 1479) the Townsite Commissions were abolished and the rules and regulations were altered and superseded to the extent that the Indian Inspector for the Indian Territory was charged with the duty of completing their work under the supervision, and subject to the approval of the Secretary of the Interior.

#### BREWER, C.:

The only question in this case is: Did the Department err as a matter of law in awarding Riddle and Cook the Preference right of purchase of the lot in controversy. There is no doubt but that the courts have a limited right to review, and power to overturn the final decisions of the Land Department. The rule seems well established that, as said in *Alluwee Oil Co. vs. Shufflin* 32 Okla. 808, 124 Pac. 15.

"If the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or because of a gross or fraudulent mistake of the facts, the rightful claimant has a remedy, and may avoid the decision of the Land Department and charge the legal title of the patentee with his equitable right to it, either upon the ground 'that, upon the facts found, conceded, or established, without dispute, at the final hearing before the Department, its officers fell into a clear error in the construction of the law applicable to the case, which caused them to issue the patent to the wrong party, or that, through fraud or gross mistake, they fell into a misapprehension of the facts proved before them, which had the like effect.' *Garrett et al vs. Walcott*, 25 Okla. 574, 106 Pac. 848; *Baldwin v. Keith* 13 Okla. 624, 75 Pac. 1124; *James v. Germania Iron Co.* 107 Fed. 597, 46 C. C. A. 476; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540. *Gonzalees v.* 562 *French* 163 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 548."

It is no longer open to controversy, that the Townsite Commissions in Indian Territory, acting under Congressional authority, had power and jurisdiction to pass upon contests between conflicting claimants of the preference right to purchase town lots, and that

upon the abolition of the commissions their power was transferred to the Indian Inspector. *Ross vs. Stewart* 57 L. Ed. U. S. 626; *Fast vs. Walcott*, — Okla. —, 134 Pac. 848. In the case of *Ross vs. Stewart*, supra, it is said by the Supreme Court of the United States:

"Relief will not be given in the courts from the decision of a town site commission for a town in the Cherokee Nation in a contest arising on conflicting applications to purchase, or from the resulting patent unless it clearly appears that the commissioners committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result the patent was issued to the wrong party."

And further it is said in the opinion that in determining the matter the test is:

"All reasonable presumption must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law \* \* \* their action must stand."

The unlawful detainer suit between the remote predecessors of the present parties, was purely a proceeding at law, involving the sole question of possession, and in no way involving the equitable jurisdiction of the court nor the title to the property. *Brennan vs. Shanks*, 24 Okla. p. 575.

In this case it is conceded that the findings of facts of the Department are conclusive, and there are no circumstances of fraud or gross mistake to justify us in going into them, if it were not so  
563 conceded. So our inquiry is narrowed to a search of the department's decision to determine if, in awarding and patenting the lot to Riddle and Cook, it fell into an error of law.

In approaching this question, we must constantly bear in mind the important facts, that Riddle and Cook were, at the time the Commission made the schedule, and their predecessors had been at all times prior thereto, the owners in possession of all the improvements on the lot; and that the Johnsons and their predecessors had never owned any improvements on it. And, further, that the improvements on the lot had not been forfeited to, or become the property of the Johnsons or their grantors, by operation of law for failure to remove them from the lot. That these facts are established by the final decisions of the suits between the parties hereinbefore referred to, as well as by the findings and decision of the Department.

As to the forfeiture of the improvements by not removing them in a reasonable time, which might generally result, it may be added the department after considering the contract under which they were made, and all the circumstances and acts of the parties, found and held, that even if this result would ordinarily follow under the contract, that the forfeiture had been waived by Fitzpatrick and his successors and could not be used as a basis for the claim of ownership by them of the improvements. This was the decision of a mixed question of law and fact, involving intent to be gathered from the acts of the parties, and all the circumstances, and is not subject

to review by the court. We then come to the consideration  
564 of the provision of the law which must be applied. It  
follows:

"When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary houses, have been made, shall be valued by the commission \* \* \* the owners of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value \* \* \*"

It is believed that when a person applied to the townsite commission to have a particular lot scheduled to him under this law, and another person appeared and contested his rights in the premises that the townsite commission had power to determine but two things. First: Are the improvements on the lot sufficient under the terms of the law to entitle it to be scheduled as an improved lot. Second: Who, of the claimants, owns the improvements situated on the lot?

That the improvements on this lot met the requirements of the law is beyond doubt. Then when the town site commission, upon its investigation found as we again assert, that Riddle owned the improvements, and that the Johnsons owned no improvements, how can it be successfully affirmed that, in awarding the lot to Riddle, it fell into an error of law. If the Indian Tribe as owner of these town lots having no relation with any of the claimants, and no relation to, or responsibility for the possessory rights the courts had recognized as between the parties, had the right to prescribe the terms, arbitrary though they were, as to whom it would give the preference right to purchase, and has done this in the agreement with the Government; then, if it had the right to do so, it would seem that when the Government, in carrying out the agreement,  
565 through the town site commission, scheduled the lot to the actual owner of the improvements, that it followed the terms of the law, instead of falling into an error of law.

Much has been said in the briefs about the improvements being wrongfully on the lot; but this loses its force when we examine and find that they were placed there in conformity to a contract which provided for an ownership of the improvements separate and distinct from the claim of possession, and which made no provision for their removal from the lot, or their acquisition by Fitzpatrick. In other words these parties dealt with a lot at a time neither owned or could own it, and by the terms of their own contract one of them found himself, later on, qualified as a purchaser of the lot, when an agreement made between the Federal Government and its owner came to be put in operation.

But it is strongly and persuasively urged, and we were induced in the former opinion in this case to believe, that we should go beyond the letter and plain meaning of the law, and consider the prior possession and previous holding of the lot. But after much consideration, aided by additional briefs and oral arguments, we think our first view was incorrect.

It is not believed, under the situation attending the disposition of town lots, in the Choctaw and Chickasaw Nations, and especially pertaining to the treaty rights granted to certain persons of prefer-

ence right purchasers, that the general rules of equity as applied, under the general laws enacted in reference to the disposition  
 566 by the Federal Government of its own public lands to its own citizens can be resorted to, or that the commission when it came to decide to whom a lot in controversy should be awarded, was required, or had in fact the right, to look elsewhere than to the language and clear intent of the treaty, in determining whether an individual claimant, or in a contest which of the claimants, was entitled to the right of preferential purchase. In other words it is thought, that in those Nations, the question of "Previous Holding" or former possession of the lot, was quite immaterial, as it in no sense entered into, or constituted a qualification to become a preferred purchaser under the treaty. A citizen of the United States, or even a member of the tribe, for that matter, might have been penning his herds on one or more of these lots since time immemorial, and without having qualified under the treaty, by placing and owning such improvements on the lot as it contemplated, the lot would have been sold at auction as an unimproved lot, to the highest bidder, quite regardless of the previous holding or former possession. This view probably could not be maintained under the agreements and laws applicable to some of the other tribes in Indian Territory, such as the Cherokee and Creek tribes, and the reasons therefor will be noticed further on.

We are aware that long before any of the agreements looking to the allotment of their lands and the segregation of townsites, were made with the civilized tribes of Indians in Indian Territory,  
 567 towns and villages had sprung up and white people were gradually populating the country; and in dealing with one another, and even with individual members of the tribes, where the tribe or nation was not itself concerned, the courts recognized the possessory rights of those occupying town lots. The early cases are *Kelly et al. vs. Johnson et al.* 1 Ind. Terr. 184, and *Walker Trad. Co. vs. Grady Trad. Co.* 1 Ind. Terr. 191. But this recognition did not proceed upon the idea that such possessor of a lot had a scintilla of actual title, or at that time any known means of ever acquiring it; but that in as much as a member of the tribe, while without any individual title, or the power to acquire such, in any part of the tribal lands, had, when once he went into possession, the right to remain and occupy the land possessed, as against other members of the tribe, when such member delivered to another, even a non member of the tribe, his possession of a lot, (and this was the practically universal custom) the courts upheld and protected such possession (*Williams vs. Works* 76 S. W. 246) probably for the very good reason that under the law no other individual could possibly assert any superior right in himself to it. It nevertheless is true that in those early days, prior to the adoption of the treaty involved here, non-members of the tribe, were without any rights, relative to the lands, as between themselves and the tribes. In *St. L. & S. F. Ry. Co. v. Ffennig Hausen* 104 S. W. 882 Justice Clayton, one of the best informed men of that time on matters peculiarly affecting the civilized tribes of Indians, said:



568 "Up to the time of the passage of that bill, as between these people and the Creek Nation, they were only squatters and trespassers, without any title, legal or equitable, to the land. But as between themselves and others dealing with them in relation to the lands having full knowledge of the situation, the courts have always recognized their contracts relating to them."

Prior to the adoption of the various agreements with these tribes relating to townsites, it cannot be said that the Federal Government either invited or induced the white man to settle or come upon the Indian lands. The law, (Sec. 2118 U. S. Rev. Stat. 1878) was to the contrary. Neither *was* the tribal governments of the Choctaws and Chickasaws responsible for the white man's coming onto their lands. Their laws and policy were directed with all the strength they could summon in their weakness, against our coming and possessing their lands. (Laws Choctaw Nation pp. 248, 268, as mentioned in Walker Trad. Co. v. Grady Trad. Co. supra,) and yet the white man came and builded towns. The provisions in the treaty, not recognizing rights, but granting rights to the white man, were not to get him to come, but because he had already arrived; and the treaty makers found him here. So much has been said by way of premise, upon which to view the treaty provisions, the townsite commission was called upon, and we in turn are called upon to construe. When the agreement was being negotiated, the tribes in their tribal capacity were the sole and exclusive proprietors of the lands upon which the towns and villages stood. There was not an outstanding right or equity against their proprietorship, which they under the law, were obliged to recognize or even consider. As against the tribe, the fee owner, no court had ever held, and no law  
569 had ever intimated that any individual had any right in law or equity he could assert. Like any other proprietor, when they came to make an arrangement, by agreement for the sale of their lands, they had the right to name the terms of its sale, and if they thought it wise or just, to give, as they must have thought, the preference right to any one to buy a specific lot at less than its value they had the right to arbitrarily determine whom it should be. The tribes, through their treaty making agents, well knew the conditions; that white men were in possession of the town lots unimproved as well as those that were improved. They also knew, and recognized that the placing of buildings on lots, had increased the value, not only of the lots on which they stood, but of all the vacant lots. It was apparent that this increase of value, ought to be accounted an equity lodged in some one. In whom should it be lodged? In the individual, white or Indian, who had merely held possession of lots, and received ground rent for same, which of itself alone added no value to the property? Or should it be to the man who built and owned the improvements, which aggregated, gave the property value? This question was settled in the agreement. The only parties having the right to say, or even to complain, have said in language that needs the application of no rules of construction, that the preference right to purchase a lot in a town in

one of these nations is in "the owner of the improvements" situated on the lot.

Very little if anything can be said of the equities, at least of either of the present parties before the court. Both of them  
570 bought their way into a law suit; they each had full knowledge of all the facts. Riddle had been an attorney in the litigation. The Johnsons were occupying a part of the lot the year before they purchased, under a written contract of tenance with Ellis, Riddle's grantor, in which his ownership of the lot seems to be admitted. When the Johnsons purchased, the lot had long since been awarded to Riddle and the purchase price deposited by him. The controversy was at the time in its initial stages before the land office yet they bought in and took the burden of the contest on their own shoulders. Both parties stand now, as they have always stood, wagering their money on their judgment as to the outcome of the litigation.

As suggested earlier in this opinion, the agreements made between the Federal Government and some of the other tribes, relative to the disposition of their town lots, would probably require a different construction. In the agreement with the Cherokees, (32 Stat. L. 616) and that with the Creeks, (31 Stat. L. 861) it would seem that the question of "Rightful possession" or in other words the "previous holding of the lot," would enter as an element into the qualification of a claimant as a preference right purchaser.

But those agreements were made long after the one involved here, between other proprietors and the government, and under very different local conditions, at least as to the Cherokees.

We have come to the conclusion that it has not been demonstrated that the Department charged with the decision of this matter, fell into an error of law, and because of such error,  
571 awarded the lot in question to the wrong party. This was the holding of the trial court, and we think it clear that the judgment therein rendered should be affirmed.

By the COURT: Adopted in Whole.  
Feb. 10, 1914.

572 In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON et al., Plaintiffs in Error,

v.

F. E. RIDDLE, Defendants in Error.

*Order.*

This cause coming on to be heard on this the 10th day of February, 1914, upon the application of the plaintiffs in error for additional time in which to prepare and present a petition for rehearing and for a stay of the mandate pending said application, it is ordered that the plaintiffs in error be granted thirty (30) days

from this date in which to file a petition for re-hearing in said cause and it is further ordered that the mandate be stayed until the filing and disposition of the petition for re-hearing.

R. L. WILLIAMS,  
*For the Chief Justice*

Approved:

JNO. B. HARRISON,  
C. A. GALBRAITH,  
*Judge Commission No. 2.*

573 Filed Mar. 6, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. & H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

*Petition for Rehearing.*

Now come the plaintiffs in error in the above entitled cause and respectfully pray that the court will grant them a re-hearing in said cause and that on said re-hearing the opinion of the court last filed in said cause and the order made affirming the judgment may be set aside, and that an order may be made reversing said cause and rendering judgment for the plaintiffs in error, or remanding it for further proceedings, and the plaintiffs in error respectfully assign the following grounds in support of their petition for re-hearing:

First. The court has overlooked the following controlling decision to which its attention was called in briefs and oral argument: Rector vs. Gibbon, 111 U. S. 276, 4 Sup. Ct. Rep. 605.

Second. The decision of the court is in conflict with the following controlling decisions, to which the attention of the court was not called: Hagar vs. Wikoff, 2 Okla. 580; Downman vs. Saunders 3 Okla. 227.

Third. The court has overlooked a question decisive of the case and duly submitted by counsel, namely, that the decision of the Townsite Board as approved by the Secretary of the Interior was based on an erroneous legal proposition, to-wit, that the effect of the Atoka Agreement was to terminate the relation of landlord and tenant existing between the parties in this case (Record, p. 139). Fraer vs. Washington, 125 Fed. 280; Ellis vs. Fitzpatrick, 64 S. W. 567; Ellis vs. Fitzpatrick, 118 Fed. 430.

Fourth. The court has overlooked the following question, decisive of the case and duly submitted by counsel, namely: Even

if it be true that by a literal interpretation of the Atoka Agreement Riddle was entitled to the patent, still on account of the relations existing between Riddle and Johnson the patent secured by Riddle inures to the benefit of Johnson.

575 We will argue these grounds in the order stated.

### First.

The court has overlooked the following controlling decision to which its attention was called in briefs and oral argument: *Rector vs. Gibbon*, 111 U. S. 276, 4 Sup. Ct. Rep. 605.

In this opinion the court has announced what seems to me a very remarkable rule. It is stated in the 4th paragraph of the syllabus. It is that the town-site commission under the Atoka Agreement, in the event of a contest, is under the duty " \* \* \* to decide two things: first, are the improvements on the lot sufficient under the law to entitle it to be listed as an improved lot; second, if so, which of the contesting claimants owns the improvements situated on the lot. And, having determined these questions, it is under the duty of awarding to the owner of such improvements the preference right to purchase the lot; and this regardless of any question of former possession, or previous holding of the lot raised by the parties that does not involve the ownership of the improvements."

Under this rule might is substituted for right. The strong arm is substituted for the law. One with force and arms might have entered upon the town lots ten days before the townsite commission scheduled the lots, burned down the improvements then on the lots, erected improvements of his own, holding possession at the point of a revolver, and thereby have acquired the legal right to the title.

This is not the law. It is in conflict with every decision construing similar statutes, and the court in its opinion does not cite a single decision from any state, or federal court, or foreign country, which lends the least support to its conclusion.

576 The fact that there are no such decisions and that this one stands alone in the history of our jurisprudence is of itself sufficient to cause the court to ponder it before permitting it to become final.

There are many cases cited in the briefs which have been filed by other counsel in this case as well as in the opinion heretofore rendered by this court as prepared by Commissioner Rosser, to which attention might be called and to which we do refer. For the purpose of this re-hearing, however, I wish merely to call attention to the case of *Rector vs. Gibbon*, 111 U. S. 276, 4 Sup. Ct. Rep. 605.

This case involved the right to a patent to a lot in Hot Springs, Arkansas, under the Act of Congress of March 3, 1877 (19 St. at L. 377). This act created a board of commissioners to lay out the Hot Springs reservation and gave to the occupants of the lots the prior right of purchase. The 5th section of the act is as follows:

"That it shall be the duty of said commissioners to show by

metes and bounds on the map herein provided for, the parcels or tracts of lands claimed by reason of improvements made thereon or occupied by each and every such claimant and occupant on said reservation; to hear any and all such proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners: Provided, however, That such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty fourth day of April, eighteen hundred and seventy six."

Prior to the passage of this act Rector leased the lot in controversy to Gibbon at an annual rent of \$500.00 and \$1500.00 additional for water privileges for a term commencing Feb. 21, 1873, and ending May 21, 1876. The lease contained a proviso  
577 that the lessor upon certain conditions might re-enter by paying for the improvements. The lessor sought re-entry, but the lessee by failing to give an inventory of certain hotel furniture prevented the amount of payment being ascertained and thereby retained possession. The townsite commission awarded the right to purchase to the lessees, although they had acquired possession under this lease. There were various changes of the title during the years involved, which we do not note. After the title was awarded to the lessee the lessor brought an action to charge the lessees as trustees of the land and to compel conveyance. The Supreme Court of the United States, in an opinion by Justice Field, granted the relief sought. It seems to me that the principle involved in that case is conclusive of the case at bar. A federal question being involved in the case at bar, the decision of the Supreme Court of the United States is therefore controlling upon this court. In discussing the respective rights of the lessor and the lessee, Justice Field says:

"But lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease. They, therefore, while retaining possession, are estopped to deny his rights. *Blight's Lessee v. Rochester*, 7 Wheat. 534. This rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment. The lessees in this case, and those deriving their interest under them, could, therefore, claim nothing against the plaintiff by virtue either of their possession, for it was in law his possession, or of their improvements, for they were in law his improvements, and entitled

him to all the benefits they conferred, whether by pre-emption or otherwise. Whatever the lessees and those under them did by way of improvement on the leased premises, inured to his benefit as absolutely and effectually as though done by himself."

Justice Field then proceeds to a discussion of the reason why Congress passed the act of 1877, and this reasoning applies with exactness to the situation in the Indian Territory at the time of the Atoka Agreement. He says:

"Whenever congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon, and not those who, by violence or fraud or breaches of contract, intruded upon the possessions of original settlers and endeavored to appropriate the benefits of their labors. There has been in this respect, in the whole legislation of the country, a consistent observance of the rules of natural right and justice. There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields of enterprise have been opened, population has spread over the public lands, villages and towns have sprung up on them, and all the industries and institutions of a civilized and prosperous people have been established, with the church and school house by their side, before the surveyor with his quadrant and line appeared. With absolute confidence these pioneers have relied upon the justice of their government, and they have never been disappointed."

He then reviews the conditions in California and Oregon which gave rise to litigation similar to this, and quotes with approval from the California case of *Ricks vs. Reed*. In that case the act of Congress relative to town lots was passed for the benefit "of the occupants thereof," and the language of the Supreme Court of California, as approved by Justice Field, is in direct conflict with the opinion last handed down by this court. Justice Field says:

"In *Ricks vs. Reed*, decided in 1862, the proper construction of the act was a question before the supreme court of California, and the court said: 'It is true, the entry of the town lands by the corporate authorities or county judge is, under the act of congress, 'in trust for the several use and benefit of the occupants thereof, according to their respective interests;' but this provision does not establish that it was the intention of Congress to give the benefits of entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original bona fide settlers of the premises and improvements in favor of those who had, by force or otherwise, intruded upon their settlement. Were such the effect of the provision in question, the trespasser of yesterday or the tenant of to-day would often be in better position than the parties who, by their previous occupation and industry, had built up the town and made the property valuable. We do not think Congress could have contemplated that results of this nature should follow from its legislation, but, on the contrary, that it intended that the original and bona fide occupants should be the recipients of

the benefits of the entry to the extent, at least, of their interest; that is, of their actual occupancy and improvements." 19 Cal. 551, 575."

We call particular attention to the fact that in this quotation "the tenant of today," is put in the same class as the "trespasser of yesterday." Justice Field again says:

"The statute, in requiring the commissioners to 'finally determine the right of each claimant or occupant to purchase' parts of the reservation, recognizes the existence of rights as between different claimants, though equally without title so far as the government is concerned. But in their decision they have ignored the universally acknowledged right as between landlord and tenants, giving to the latter what could by no possibility belong to them in the relation which they occupied."

The words underlined in this last quotation are exactly applicable to the case at bar and show beyond controversy that this court is wrong in saying that it was the intention of Congress in passing the Atoka Agreement to ignore the relation between landlord and tenant, or the prior rights of the parties.

After referring to the leading case of *Johnson vs. Towsley*, 13 Wall. 72, and quoting from Mr. Justice Miller's opinion, holding that the decision of the land office authorities is subject to review by the courts, Mr. Justice Field says:

"The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party, when in equity and in good conscience, and by the laws of Congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner and compel him to convey the legal title."

There are numerous other authorities found on pages 17-27 of the brief prepared by Judge Potter in this case, as well as in the former opinion prepared by Commissioner Rosser, which I do not take time to review, although I respectfully invite the court's attention to them.

I do not review them because it seems to me that *Rector vs. Gibbon* is conclusive and is controlling, and therefore I fear that  
580 calling attention to other authorities may divert the attention of the court from this one, and I respectfully submit that if *Rector vs. Gibbon* is not conclusive and controlling, that this court should at least point out the distinctions which exist.

## Second.

The decision of the court is in conflict with the following controlling decisions, to which the attention of the court was not called: *Hagar vs. Wikoff*, 2 Okla. 580; *Downman vs. Saunders*, 3 Okla. 227.

*Hagar vs. Wikoff*, 2 Okla. 580; and *Downman vs. Saunders*, 3 Okla. 227, are controlling decisions of this court to which attention was not called.

The act to provide for townsite entries in the Territory of Oklahoma was under consideration in both of those cases. It is the act of Congress of May 14, 1890, and is found at page 64 of the Statutes



of Oklahoma of 1893. It provides that certain public lands situated in the Territory of Oklahoma " \* \* \* may be entered as townsites for the several use and benefit of the occupants thereof by three trustees to be appointed by the Secretary of the Interior for that purpose \* \* \*." Sec. 7 of the act empowers the trustees to hear and determine all controversies arising and to execute conveyances. It will be noted that the townsites are entered for the "benefit of the occupants thereof." "Occupants" is no more elastic a term than "owner of the improvements," and the townsite act does not give the trustees any more discretion than the Atowa Agreement gives the townsite commissioners.

In Hagar vs. Wikoff there were various transfers as here, but I ignore them. Wikoff leased a lot in the town of Stillwater to  
 581 Mrs. Hagar in 1889, and she and her husband continued in the occupancy of it during all the times involved. The townsite act was approved May 14, 1890. It will be noticed therefore that at the time the act was approved the tenant was in possession. She paid rent until July, 1890, at which time Mr. Hagar placed a tent on the lot and took up his residence in the tent and afterwards erected a building on the lot, and asserted claim to the lot by reason of his occupancy. It will be noticed that the facts of these two cases are practically the same, and there, as here, the tenant insisted on the strict letter of the statute, while there, as here, the landlord appealed to those same fundamental principles of the law which enter into the interpretation of every statute. In that case Mr. Hagar tried to make some additional claim on account of the improvements and occupancy which he made, while Mrs. Hagar was the tenant, but this was denied by the court. At page 586 of the 2nd Oklahoma, the court say:

"Having gone into possession of the lot under the contract to pay rent, and having actually acknowledged an interest in the property in favor of another by the payment of rent, he can not be heard to say that he occupied the lot for himself, unless he had openly and in good faith surrendered possession to the person from whom he obtained possession. His occupancy was the occupancy of the person from whom he procured possession. What improvements he made thereon in the absence of any agreement became the improvements of his landlord, and all the time he was occupying the lot his landlord was in actual occupancy through him, and the policy of the law, good conscience and morals, will not permit him to say that it was his occupancy. If he desired to assert a claim to the lot before the townsite board, he should have in good faith vacated the lot, notified his landlord or the person who gave him permission to occupy, and made his entry upon the lot as an adverse claimant."

The same rule is stated in the 2nd paragraph of the syllabus, which is as follows:

"A person who goes into possession of a town lot upon public lands as a tenant of one who has improved the lot by erecting a building thereon, will not be heard to assert a claim adverse to his landlord by reason of occupancy, settlement or improvement until

he shall have vacated the premises and surrendered possession to the landlord."

582

*Downman vs. Saunders*, 3 Okla., 227, construes this townsite act and is also in direct conflict with the opinion last handed down in the case at bar. In this case (as seems to be usual in such cases) there were various transfers of interest. Again we do not take time to note them. The question arose between one who had been put out of possession by threats, force and intimidation and him who had secured the possession, erected improvements and held the actual occupancy at the time the townsite board scheduled the lot. There, as here, the townsite board awarded the lot to the actual occupant thereof and the owner of the improvements. The action was brought by the one entitled to the possession to have the trust declared. There, as here, a claim was made for literal construction of the statute, but there the claim was denied, while here it has been sustained. There the party was prevented from making valuable improvements by the hostile acts of the defendant, and there the actual merits of the case prevailed, while here they have not prevailed. At page 233 of the 3rd Oklahoma, it is said by the court:

"Counsel for plaintiff in error contend that the judgment should be reversed because plaintiff below was not an actual occupant upon the lots on July 27, 1892, the date when the land was entered for townsite purposes, and because the improvements and possession of the plaintiff were not sufficient to constitute him an occupant of the lots for townsite purposes. It would be a queer rule of law that would permit plaintiffs in error to urge either of these objections to the plaintiff's right to the lots."

At page 234 it is again said:

"The evidence also shows that Saunders had made arrangements for lumber to build on the lots, and went there on July 22d for the purpose of making further improvements and that Tucker, with a hatchet in his hand, refused Saunders permission to go upon the lots, and threatened to split his head open if he went upon them or even through his own fence. Saunders is admitted to be a prior settler to Tucker. His rights to the lots attached long prior to those of Tucker and existed with Tucker's knowledge, and it does not lie in the mouth of a trespasser, a law-breaker, a ruffian and a bully, who keeps a settler off of government land, to claim that he has a prior right to acquire title because of the insufficiency of his adversary's occupancy and improvement, when better  
583 improvements have been prevented by the unlawful force and violence of the very person who makes these objections against the right of the settler. *It would not do to hold that one settler may eject another settler from his settlement, and take possession of his improvements, and prevent the first settler from making further improvements, and then succeed on account of the slight improvements of the first party.*"

The lines underscored are in direct conflict with the opinion last handed down in the case at bar and are directly applicable.

The court then say at page 235:

"Such a holding as that would be placing a premium upon fraud, violence and intimidation, which we cannot consent to do. The bounty of the government in giving lands to occupants for town-site purposes at the date of entry, was not intended to aid those who unlawfully and forcibly take possession of the very ground settled upon by another party."

The last quotation is supported by references to *Rector vs. Gibbon*, from which we have already quoted, and *Atherton vs. Fowler*, 96 U. S. 513. We quote this last reference:

"As was said by Mr. Justice Miller, in the often cited case of *Atherton v. Fowler*, 96 U. S. 513: 'The generosity by which congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicide, and other crimes of less moral turpitude.'"

In conclusion and in support of its holding that the law will prevail over might or artifice, the court say:

"There was no error, under the evidence, in finding that in equity Saunders was the actual occupant of the land at the date of the entry of the townsite, for it clearly shows that he was an occupant prior to the interruption by Tucker, and that he would have been an actual occupant, and would have had ample improvements on the land to entitle him to a deed by virtue of his occupancy and improvements, except for the forcible resistance of Tucker and this resistance cannot permit Tucker to acquire and convey to another, who had notice of Saunders' claim, the title to property which, in equity and good conscience, belongs to Saunders."

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### Third.

The court has overlooked a question decisive of the case and duly submitted by counsel, namely, that the decision of the Town-site Board as approved by the Secretary of the Interior was based on an erroneous legal proposition, to-wit, that the effect of the Atoka Agreement was to terminate the relation of landlord and tenant existing between the parties in this case (*Record*, page 139). *Fraer vs. Washington*, 125 Fed. 280; *Ellis vs. Fitzpatrick*, 64 S. W. 567; *Ellis vs. Fitzpatrick*, 118 Fed. 430.

At page 139 of the case made is set out the reason why the lot was scheduled to Riddle, where in speaking of the claim of Johnson's predecessor it is said:

"They were mere trespassers, and occupied the lot in direct vio-

lation of section 2118, Revised Statutes. The lot which they both claimed was the property of the Nation and subject to such laws as Congress might choose to enact. On June 28, 1898, the Atoka Agreement became effective. By its provisions the owner of the improvements on town lots was given the right to purchase on certain conditions. It also declared that all unimproved lots should be sold at public auction and the proceeds turned over to the nation. The town lots in Chickasha became subject to that law from and after its passage. The idea of any person holding or being allowed to purchase, except at auction, property on which he owned no improvements, is negated by the terms of the Act. A certain species of rights were recognized and no other. For a claimant to fail to come within the provisions of the law leaves no alternative but to schedule the lot to one who does come within its provisions—the owner of the improvements, or sell it at public auction, if unimproved. The law is clear and unequivocal on this point. Fitzpatrick's rights in the lot in controversy were extinguished by operation of law on June 28, 1898, as he owned no improvements thereon at that time. Ellis, as actual occupant of the lot, from and after that date, by operation of law ceased to be the tenant of Fitzpatrick and Congress, having declared Fitzpatrick's claim at an end, had by virtue of his ownership of the improvements, an indefeasible right in law to purchase it."

We call particular attention to the last two sentences of this quotation, from which it appears that it was the opinion of the acting commissioner of Indian Affairs that the Atoka Agreement on June 28, 1898, extinguished Fitzpatrick's (Johnson's predecessor) rights in the lots and that Ellis (Riddle's predecessor) from and after that date by operation of law ceased to be the tenant of Fitzpatrick, and therefore had from that date a right to purchase.

This opinion of the Commissioner of Indian Affairs forms the basis on which Riddle's title rests. The department rightly scheduled the lot to Riddle, if that statement of the law is correct, but if that statement of the law is incorrect, and if Riddle continued to be Johnson's tenant, then of course the reason for the department's ruling has fallen and the rule itself must fall.

The authorities settle this question, it having been specifically held to the contrary in at least three cases. In *Ellis vs. Fitzpatrick*, 64 S. W. 567 (the unlawful detainer branch of this case), Judge Clayton says:

"As to the first paragraph of the demurrer, we know of no law which permits a tenant to deny the title of his landlord, under whom he entered, because of the fact that there were no valuable improvements on the leased premises. It is true that under the Atoka agreement a claimant to a town lot, before he can become the owner of it, must have upon it valuable and lasting improvements; but before he can put the improvements upon it he must have obtained possession of it, and in this case one of the purposes for which the plaintiff brought his suit against his delinquent tenant, as alleged in his complaint, was that he might avail himself of the

benefits of the Atoka agreement, by placing improvements upon the lot, and thus enable himself to become its absolute owner. Besides, the tenant in this case, after obtaining possession of the lot under the lease, put upon it valuable and lasting improvements, which, as between the parties to the lease, inured to the benefit of the landlord. It may have been that the very object of the landlord in leasing the lot was to have it improved by his tenant, so that he might be able, under the peculiar conditions that existed here, to hold it as against every title except that of the Indian nation. Whether this was the intention or not, in law it had that effect. The possession of the tenant is that of his landlord. There is no merit in the position taken by appellant's counsel that the Atoka agreement annulled and abrogated the validity of the leases between white men of town lots in the Choctaw and Chickasaw Nations. On the contrary, if it had any effect on this class of contracts at all, it was to validate them. It is by the agreement alone that we find statutory authority for white men to hold town lots in these nations; and when the agreement was entered into, recognizing the validity of these holdings, and providing a method for transferring title, all objections to the invalidity of contracts between white men in relation to the possession of these lots were overcome. It mattered not to the Indian who made the improvement or was entitled to buy the lots; and, as to the white men, the possession of the tenant was that of the landlord, and he could not deny his title to the premises, whether improved or not. The complaint alleges possession in the plaintiff at the time of the execution of the lease, a lease of the premises to the defendant, an entry by the defendant under the lease, a termination of the lease, and a refusal to surrender possession of the premises after demand. And ordinarily this is all that is required. The rule is that a tenant cannot deny his landlord's title, although he (the landlord) may have none; nor is it necessary that the landlord, at the time of the execution of the lease, should have been in possession. It is sufficient if the tenant entered peaceably under the lease and paid rent. 1 Wood, Landl. & Ten. Par. 231. The question involved under the first paragraph of the demurrer has been decided adversely to the appellant's contention by this court in the cases of *Kelly v. Johnson*, 1 Ind. T. 184, 39 S. W. 352, and *Walker Trading Co. v. Grady Trading Co.*, 1 Ind. T. 191, 39 S. W. 364. And we adhere to those decisions."

This case is affirmed by the Circuit Court of Appeals in *Ellis vs. Fitzpatrick*, 118 Fed. 430, and the same point is ruled in *Fraer vs. Washington*, 125 Fed. 280. It is manifest, therefore, that Riddle prevailed before the department, because of an error of law.

#### Fourth.

The court has overlooked the following question, decisive of the case and duly submitted by counsel, namely: Even if it be true that by a literal interpretation of the Atoka Agreement Riddle was entitled to the patent, still on account of the relations existing be-

tween Riddle and Johnson the patent secured by Riddle inures the benefit of Johnson.

The point I have in mind is that the relation between Riddle and Johnson was such that as a matter of law the title acquired by Riddle inured to Johnson's benefit regardless of the question whether or not Riddle or Johnson was entitled to the patent. Suppose, for instance, that A. is guardian of B., and with B.'s money buys real estate, taking title to himself. Plainly A. takes as trustee for B., and while as between him and his venditor title passes to him, still on account of the relations between him and B. he holds the title as trustee for B. Suppose another case. A mortgagee in possession under duty to pay taxes allows the property to be sold for taxes and purchases the tax title. The state properly issues to him a tax deed, and as between him and the state the act is final. The relations between him and his mortgagor, however, are such that the deed which he procures is for the benefit of the mortgagor.

In order that a trust *ex maleficio* may arise, it is not necessary that the title vested in the trustee was one which as a matter of law the grantor should have conveyed to the *cestui que trust*, but it is sufficient that the trustee has acquired a title, which it is a violation of his duty or good faith for him to assert against the *cestui que trust*.

If, therefore, Riddle founds his title upon a violation of his contract, or a violation of his duty, or a violation of the law, the title which he so acquires inures to the benefit of Johnson.

The general rule is well stated by Judge Sanborn in *Trice vs. Comstock*, 121 Fed. 620, 61 L. R. A. 176, where the syllabus, supported by a wealth of citations, is as follows:

"Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

This rule, as well as the argument I have been trying to make, is illustrated by the decision in *Luse vs. Rankin* (Neb.), 78 N. W. 258, where the 4th paragraph of the syllabus is as follows:

"One who has obtained a lease from the state, with actual or constructive notice of another's prior claim thereto, will be treated as holding such lease in trust for the person who is equitably entitled to receive it."

The case of *Cone vs. Wood*, 108 Iowa 260, is reported in the 75th Am. St. Rep. at page 223, and following the case is an elaborate note on "who may purchase and enforce a tax title." An examination of this note discloses that mortgagees, agents, attorneys, co-tenants, guardians, heirs, licencees and any others charged with a duty in the matter, cannot acquire a tax title, and if they do the title which they acquire inures to the benefit of the person to whom they

owe the duty. To the same effect is the decision of our own court in *Brooks vs. Garner*, 20 Okla. 236.

It seems to us that these cases are in point, and we content ourselves with referring to them and to the numerous author- cited in the note, without lengthening this petition by more detailed reference.

The principle established by these cases, as well as many others cited, in the original briefs and in the able opinion of Commissioner Rosser, is that no man can take advantage of his own wrong. It was wrong for Riddle to withhold possession from Johnson. It was wrong for him to assert title hostile to that of Johnson. It was wrong for him to take advantage of the right which he acquired under Johnson to assert a hostile claim. From the earliest times the courts have held that a lawful right cannot be founded upon an unlawful wrong. The case of *Young vs. Severy*, 5 Okla. 630, is very closely in point. The second paragraph of the syllabus is as follows:

589 "A tenant is estopped from denying his landlord's title, in so far as the right to the use and possession of the premises is concerned, although the title under which the latter first acquired possession and control thereof, has reverted to the United States, and both the landlord and tenant are claimants for said property and applicants and contestants for title thereto under and by virtue of the laws regulating the disposal thereof."

At page 640 the court say:

"According to the evidence and agreed facts in this case, said S. W. Sawyer was the only occupant of the lots in question during the month of May, 1892, when the tract, including same, was entered, as a townsite, for the use and benefit of the occupants thereof; the occupancy of plaintiff in error as Sawyer's tenant being, in legal effect, the occupancy of Sawyer in person. But for this tenancy, plaintiff in error, so far as shown by the record, would never have been an occupant of these premises, and every principle of law and justice require that such occupancy shall not be used to defeat the right of his landlord to the use and possession of said property."

In *Shy vs. Brockhause*, 7 Okla. 35, the syllabus is as follows:

"An occupant of a town lot before the legal title has passed from the government, can maintain a suit in ejectment against one who is in possession thereof, as his tenant; and such tenant is estopped from in any way question- his landlord's title."

At page 40 the court say:

\* \* \* "But where a party gets into possession of real estate by virtue of a lease, he cannot defeat his landlord's right to recover by pleading title in the government. Before he can be heard to question his landlord's title in any way, he must first surrender possession of the premises. (See *Hagar v. Wykoff*, 2 Okla. 584, 39 Pac. 281.) And the surrender to his landlord must be open and in good faith. It must be a complete surrender of all possession and control. Nothing short of this will do."

In *Bertram vs. Cook*, 32 Mich. 518, the 2nd and 3rd paragraphs of the syllabus are as follows:

"One who has taken possession under a lease cannot dispute his



landlord's title, or make a valid attornment to a third person, nor during his tenancy can he buy in an outstanding title, without his landlord's consent; he can do no act inconsistent with, or which could change the relation between himself and his landlord, without first yielding and delivering up to the latter the possession acquired from him."

"Where one enters under an arrangement with another who is in possession by virtue of a contract with the owner requiring him to pay all taxes, he can acquire no valid title to the premises  
590 as against such owner by virtue of any tax-sales for taxes which under the contract it was the duty of his assignor to pay, but would hold any title thus acquired in trust for such owner."

In *O'Halloran vs. Fitzgerald*, 71 Ill. 53, the 1st, 2nd and 3rd paragraphs of the syllabus are as follows:

"Where a party enters into possession of land as mortgagee and trustee of the owner, and in fraud of the owner's rights, while holding the land in such position, acquires tax titles on the same, a court of equity will have jurisdiction of a bill by the owner for redemption, and for an account of the rents and profits, and to remove the adverse title so acquired. In such a case, the main issue is one of fraud in the discharge of a trust, and not the technical validity of the tax titles."

"Where land was left by the owner in the possession of one as tenant and agent, to look after the same and to acquire the title to a part, and such agent, after the owner's death, procured a third person to advance \$100 to secure the title for the benefit of the widow and heirs of the deceased owner, and gave him possession of the whole of the land out of which to reimburse himself, and such third person, while so in possession, suffered the lands to go to sale, and thereby acquired tax titles to the same: Held, that he became a trustee for the heirs, and that the titles so acquired by him inured to the benefit of his cestui que trust, but that he had a lien on the lands until reimbursed for all moneys advanced by him."

"One in possession of land as trustee can not buy in an outstanding landlord's title, or make a valid attornment to a third person, nor acquired to defeat the title of the cestui que trust, in equity."

In *Brugett vs. Taliaferro*, 118 Ill. 503, 9 N. E. 334, the first and second paragraphs of the syllabus are as follows:

"A lessee who, in consideration of the lease and of possession, agrees, inter alia, to pay taxes, cannot acquire a tax title adverse to his lessor. He will hold his tax title in trust for the lessor; and his grantee will stand in no better position."

"Where one of several co-tenants acquires an outstanding title before he has claimed to hold adversely to his co-tenant, he will take for the benefit of all the co-tenants, subject to their liability to contribute to the cost."

If, therefore, Riddle acquired this title through a breach of duty the law imposes upon it a trust for the benefit of Johnson and this  
591 regardless of the intentions of the parties, but in order that the law may rise equal to the attempted wrong. It matters not what the form of the transaction may be, the law must

prove equal to the offense, and no man must be allowed to take advantage of his own wrong.

For the reasons stated we respectfully urge that a re-hearing be granted.

Respectfully submitted,

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Service of copy accepted this 5th day of March, 1914.

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Copy.

592 Filed Mar. 14, 1914. W. H. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. and H. B. JOHNSON and FIRST NATIONAL BANK BUILDING  
COMPANY, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

*Answer to Petition for Rehearing and Brief in Support Thereof.*

Every phase of this case has been so thoroughly argued and re-argued, briefed and rebriefed and considered from every angle by the court that we feel nothing has or could have been overlooked either by counsel or court and that any reply to the petition for rehearing is really unnecessary.

Counsel relies upon four allegations for rehearing herein, but in our judgment he has failed to substantiate either one in his brief and argument.

His first ground is that the Court overlooked the principle laid down in the case of Rector v. Gibbon, 111 U. S. 276.

We understand that Judge Ames prepared this petition and wrote the argument in support thereof, and we are certain if he had been connected with this litigation during its different stages he would not have alleged that the principle laid down in Rector v. Gibbon was overlooked. In fact, it has been in this case since the year One, and has never been overlooked by any decision by the officers of the Interior Department passing upon the question involved or by any court or Judge thereof, but has been constantly kept before  
593 them, argued and reargued, and while the Court in this opinion does not specifically mention the case it is clear to any lawyer that it was considered in preparing the opinion of the court. In fact, the principle laid down in the case of Rector v.

Gibbon is so well known to every court and lawyer who has had occasion to investigate or determine rights growing out of a trust relation, that it would be practically impossible to overlook the principles announced therein. The principle has become so elementary that it would be really embarrassing to charge that the court had overlooked it. Instead of the court in this instance overlooking the principle laid down in *Rector v. Gibbon*, supra, the opinion is based upon the principles therein enunciated; or in other words, the court in that case held that the decision of the Land Department should rest upon the Act of Congress to carry out the plain purpose and intent of Congress, and we can prove by the language of Judge Ames, which will be referred to later, that in this case the Land Department as well as this court has given effect to the purpose and intent of Congress.

It is only necessary to make a cursory examination of the case of *Rector v. Gibbon* to see the distinction between the facts in that case and the case before the court. The basis and foundation of acquiring title in that case was the claimant's possession and occupancy in connection with his improvements. Quoting from the decision of Justice Field:

"The Act of 1877 embraces, therefore, under the designation of claimants and occupants, those who had made improvements, or claimed possession under an assertion of title or a right of pre-emption by reason of their location or settlement."

The facts further show in the above case that not only had Gibbon been the actual occupant of the lot for many years and made valuable and lasting improvements thereon before he leased to the lessees, but the lessees went into possession under a contract specifically providing that the title to the improvements placed thereon by the lessees should vest in the lessor. In other words, the lessee erected the improvements under a special contract at the expense of the lessor and for his benefit. Quite different from the case at bar.

The right to purchase under the Hot Springs Act was conferred upon the actual settler or occupant of the lot who had made the improvements, and it was this Act that the Commissioners disregarded and therefore the Court held that they had clearly committed an error of law. The Court states, in the opinion:

"The case as shown by the bill is one of a clear disregard by the commissioners of their authority. The statute in terms declares that they shall not consider any claims accruing after April 24, 1876. They have not heeded this injunction, but awarded the right of purchase to parties whose only claim originated in 1877. It would require, under these circumstances, very clear language to deprive the injured party of relief."

In as much as the statute conferred the right upon the real bona fide occupants of the lot, in connection with the ownership of the improvements, and the tenant going into possession under a contract to make improvements for the benefit of the landlord, the Court rightly held that the possession of the tenant was the possession of the landlord. Or in other words, the right was conferred upon the bona fide occupant of the lots. The landlord was in possession

through his tenant, the possession of the tenant being that of the landlord, and the tenant in that case could only acquire the title by being in possession under the landlord. His right to purchase depended upon his right to possession or right to occupancy.

Under the Chickasaw and Choctaw Treaty the landlord out of possession, owning the improvements, would have the same right to purchase as though he had possession. The lessee who indisputably owned the improvements, although his subtenant might be the actual occupant and in possession, would have the only right to purchase in preference to either the landlord or the subtenant who was in possession. In other words, the possession, under the Chickasaw and Choctaw Treaty, conferred no right separate and independent of the ownership of the improvements. But as we have stated, this has been so ably illustrated in the opinion of the court that it is little less than absurd to say that the Court had overlooked the principle announced in the case of *Rector v. Gibbon*.

As shown by the Court in the opinion, under the Creek Treaty and the Cherokee Treaty the preference right to purchase certain lots was conferred upon parties who were in the rightful occupancy of rightful possession of the lots, and this shows beyond doubt that Congress was not dealing blindly in making these different treaties with the different tribes. That Congress and the Chickasaw and Choctaw Nations did not inadvertently confer upon the owner of improvements the preference right to purchase. This is in harmony with the statement made by the Circuit Court of Appeals in case of *Fraer v. Washington*, cited by Judge Ames. In that case, it will be recalled, the tenant went in possession under a contract agreeing to place certain improvements upon the lot, to be paid for by the landlord. The Court states, on page 283:

"It is true that the Act concedes to the owner of improvements upon any town site lot the preference right to purchase the lot after the townsite has been surveyed and platted and the lots have been appraised on making certain specified payments within a certain period, but it does not appear in the present instance that any of these acts have been done or that the time has arrived when the purchase can be effected. If it has arrived it is by no means clear that the lessee is the owner of the improvements which he made during his term. The lease did not provide that the improvements made by the lessee should be esteemed his property, but only that said property shall be delivered to said Washington upon his paying or satisfying said James Fraer or his assigns for all improvements put thereon while the same was so rented to the said James Fraer. \* \* \* In the absence of an express provision in the lease severing the improvements from the realty and declaring that they should be and remain the property of the lessee it might well be that they become part of the freehold according to the general rule that one who erects a permanent structure on land makes it a part of the land."

In the present case there was a special contract providing that the lessee should be the exclusive and sole owner of the improvements.

Judge Ames, in case of *Cochran v. Hocker et al.*, 34 Okla. 234, states:

596 "The Townsite Commission was further charged with the duty of appraising the lots within the town, and the owner of the improvements thereon was given the right to purchase at fifty per cent. of the appraised value."

The Court in the opinion rightly held that the proprietorship of the land in question was in the Chickasaw and Choctaw tribes of Indians and that they had authority, by the consent of the Government to say upon whom and under what conditions they would confer the preference right to purchase. This is very clearly expressed by Justice Brewer as follows (page II):

"If the Indian Tribe as owner of these town lots having no relation with any of the claimants, and no relation to or responsibility for the possessory rights the courts had recognized as between the parties, had the right to prescribe the terms, arbitrary though they were, as to whom it would give the preference right to purchase, and has done this in the agreement with the Government; then, if it had the right to do so, it would seem that when the Government, in carrying out the agreement, through the townsite commission, scheduled the lot to the actual owner of the improvements, that it followed the terms of the law, instead of falling into an error of law."

The learned judge in coming to this conclusion does not stand alone, but other eminent judges have also given views in accord therewith.

Again quoting from the case of *Cochran v. Hocker, et al.*, Judge Ames uses this language:

"The lands of the Creek Nation originally belonged to the Nation as such and not to the citizens thereof. They constituted the public domain of the Tribe and no member of the Tribe owned any particular land or any undivided interest therein or any inheritable interest. They were held to a certain extent as the public domain of the United States is held. It belongs to the Government. From this condition of affairs it necessarily resulted that no citizens of the tribe could convey any right of property or possession in any land within the tribal limits. Towns and cities were built notwithstanding these conditions, because the inhabitants thereof (citizens of the United States and citizens of the tribe) were willing to take the chance upon treaties being made between the United States and the tribe, protecting these investments. The purpose of the acts referred to was in part to make possible the acquisition of title to town lots in the Indian Territory, and in so doing to recognize the rights of those who had erected improvements thereon, by giving them the right to purchase at one-half the appraised value. But these rights vested only in accordance with the terms of the treaties and upon the conditions thereby imposed."

And after reciting the different steps to be taken by the Townsite Commission in laying out towns, etc., Judge Ames states:

"After this, the owner of the improvements has the option of purchasing at one half of the appraised value."

The opinion in the present case and Judge Ames' views in the case of *Cochran v. Hocker* find support in the case of *Ross vs. Stewart*, in the opinion written by Justice Vandeventer, 227 U. S. Vol. 57 L. ed. page 628, as follows:

"In this connection it is well to remember that no individual, even if an occupant and owning the improvements, had more than a possessory claim to the land to which the legislation was to be applied, and that all possessory claims were held subject to a superior ownership in fee, which was in the Cherokee Tribe."

Can it be said that the Court disregarded the Act of Congress or that it is clear it committed error in following the provisions of the Act? The question furnishes sufficient answer.

It has been said that the way we reach opinions or conclusions depends upon our viewpoint.

The second point made is that the decision of the Court is in conflict with the decisions of *Hager v. Wikoff*, 2 Okla. 580 and *Downman v. Saunders*, 3 Okla. 227.

Judge Ames quotes sufficiently from these cases in his brief to show that they are wholly inapplicable. The right under the Act of Congress in question involved in that case depends upon occupancy of the lot, or in other words, the rightful possession of the lot. And this was the question that the Townsite Commissioners determined, and the Court simply announced the well recognized doctrine that the possession of the tenant was the possession of the landlord, that the occupancy of the tenant was the occupancy of the landlord; and not only that, but in the case of *Hager v.*

598 *Wikoff*, supra, the landlord who was in possession through his tenant also owned the improvements. So the tenant really had no standing, under the Act of Congress, either as owner of the improvements or as having possession, nor was he the occupant of the lot. He was simply *was* using the lot under contract and the landlord was in possession through him.

We do not understand the rule to be that because the court does not quote from or cite every case touching upon the principle involved, although when applied to the facts would be abstract principles, that such cases have been overlooked or the principles involved ignored.

The third point raised in the petition is that the Court has overlooked a question decisive of the case and duly submitted by counsel, that is, that the Land Department committed error in holding that the Atoka Agreement had the effect to terminate the relation of landlord and tenant.

We think the opinion shows that neither this question or any other question raised was overlooked; in fact, the ground upon which the decision in this case is based shows that even if it should be conceded that the Secretary made an error in disposing of this point, the same was immaterial and was not controlling and did not control the Secretary in disposing of the questions involved.

By reading the opinion of the Indian Inspector, the Commis-

sioner of Indian Affairs and the Secretary of the Interior, it will be seen that the rights of the parties were disposed of upon other and more substantial grounds; or in other words, it was immaterial whether the relation of landlord and tenant had terminated or not on the date of the Atoka Agreement, in as much as the lot on that date had substantial and lasting improvements thereon in the purview of the Treaty, and the contestee and patentee, Riddle, was the owner of these improvements.

599 Counsel quotes from the case of *Fraer v. Washington*, 120 Federal, 280, *supra*, and *Ellis v. Fitzpatrick*, 118 Federal, 430, to prove this allegation. In our judgment, the Commissioner committed no error, as contended by counsel. As a matter of fact, prior to the Atoka Agreement Fitzpatrick had no right within and to the lot and that Agreement conferred no rights upon him, and by the provisions of the Agreement giving the unconditional preference right to purchase to the owner of the improvements on the lot, and another party owning the improvements, it denied him even the chance of securing a right which he did not have before. This was settled by the case of *Fraer v. Washington*, *supra*, cited by Judge Ames, in the following language:

"Fraer, the lessee, on the other hand, not being a member of any Indian Tribe, had no such right. He had at that time no interest in the lot, either present, future or contingent, such as a Court of law would recognize or enforce."

This doctrine is also upheld by Judge Ames in the case of *Cochran v. Hocker, et al.*, *supra*, page 237:

"No rights having vested under Section 15 of the Curtis Act, it is settled that under the provisions of the Creek Agreement, embodied in the Act of 1901, the Secretary of the Interior in establishing the town site of Sapulpa, could omit a portion of the land embraced within the corporate limits established under Section 14 of the Curtis Act, and that the occupants of these omitted lands did not have the right to acquire title thereto."

In effect, Judge Ames held, as did the Secretary of the Interior, that the Creek Treaty declared the occupancy of the lots contended for, in the townsite of Sapulpa, at an end, and that their title, whatever it was, was extinguished by virtue of that Agreement and the acts of the Secretary of the Interior thereunder.

Judge Ames then states, on page 13 of his brief, that this opinion of the Commissioner of Indian Affairs forms the basis upon which Riddle's title rests. In this he is in error. The basis of Riddle's title is the ownership of the improvements, which is recognized as giving him the preference right to purchase the lot by the plain provisions of the Chickasaw and Choctaw Agreement, and not by any declarations made by the Indian Commissioner.

600 The case of *Ellis v. Fitzpatrick* is also relied on and a long quotation made from the opinion of Judge Clayton. This case was appealed to the Circuit Court of Appeals and that Court in disposing of the case simply held that the petition or complaint stated a good cause of action for unlawful detainer, and stated that this was the



only point before them for determination. The concluding language of the opinion is as follows:

"We are of opinion that the complaint stated a good cause of action for unlawful detainer, and as this is the only question which is before this court for review, and as it was correctly decided by both the lower courts, the judgment of each court is hereby affirmed."

Under the Fourth proposition discussed by Judge Ames it is contended that even if the Department made no error and conceding that it scheduled and sold the lot to the rightful parties under the Treaty provisions and that the acts and decision of the Land Department were in harmony with the Treaty provisions, yet his client as an exception to the rule laid down by all the courts, should be awarded the property in question.

This contention is at variance with the universal rule laid down by the supreme court of the United States as well as this court, and counsel has cited no case in point upholding the doctrine contended for.

Counsel cites many cases based upon the relation of mortgagor and mortgagee, where the mortgagee is in possession and under an agreement to pay taxes permits the *property* to sell and purchases the property in his own name; also cases of guardian and ward, where the guardian buys property with the ward's money and takes the deeds in his own name; cases of principal and agent, where the agent purchases the property with the money of the principal and takes the property in his own name; cases of attorney and client, where the attorney takes the legal title in his own name, which in good conscience and equity belongs to his client; and various other kindred relations, but not a single case does he cite based upon  
601 facts similar to the facts in the case before the court.

What confidential relation existed between Johnson and Riddle that would make the rule contended for by counsel applicable? The undisputed testimony in the record shows that Ellis was at one time a tenant of Fitzpatrick, that this relation was terminated by Ellis denying Fitzpatrick's title or right to possession; if not by the terms of the Atoka Agreement; that an unlawful detainer suit was filed, prosecuted through the courts and finally decided in Fitzpatrick's favor. That Fitzpatrick, while the unlawful detainer suit was pending, sold all his right, title and interest to Bourland & Cross, Johnson's predecessors; that Ellis in the meantime sold his interest to Riddle; that long after the unlawful detainer suit had been determined, Ellis and his assignees had been evicted and Bourland and Cross placed in possession, and long after the Government had sold the lot to Riddle and the same had been paid for, and long after Riddle had filed an ejectment suit for possession against Bourland and Cross, Johnson's immediate predecessors, and while such suit was pending and being prosecuted with all the vigor and earnestness that usually enters into law suits, Johnson purchased from Bourland and Cross, against whom the suit was pending. The relation of landlord and tenant had long been terminated. When was Riddle ever Johnson's tenant? The only confidential relation that ever existed between Johnson and any of

the parties claiming interest in the lot in question was when Johnson leased a portion of the lot from Riddle's predecessor, Ellis, and expressly acknowledged title in Ellis and expressly agreed that the improvements placed thereon should belong to Ellis, and expressly agreed to deliver possession at the end of his term. If title had been awarded to Johnson by the Land Department, then the authorities cited by counsel might have some application, but the record wholly fails to show any confidential relation having ever existed between Riddle and Johnson, other than under the agreement Johnson made with Ellis.

But Judge Ames says that although the Department made no error of law, properly construed the Act of Congress, yet the Court should hold that an error of law was committed. This is contrary to the unbroken rule laid down by the supreme court of the United States and the supreme court of this state.

In the case relied on by counsel for Johnson, *Rector vs. Gibbon*, supra, the court states:

"That when the legal title has passed from the United States to one party when in equity and good conscience and by the laws of Congress it ought to go to another, a court of equity will convert the holder into a trustee."

And further:

"The parties actually entitled under the law cannot, because of its misconstruction by these officers, be deprived of their rights."

Not some equity arising outside of the law. If the law has been properly construed and the rightful parties have been awarded the property under the law, then the courts cannot hold that an error of law has been committed. The supreme court cites:

*Shepley v. Cowan*, 91 U. S. 330.

*Moore v. Robbins*, 96 U. S. 536.

*Quinby v. Conlan*, 104 U. S. 420.

*Smelling Company v. Kemp, et al.*, 104 U. S. 636.

The law is too well settled for argument; in fact, it is the universal rule that before a court of equity will interfere and declare a patentee holding the legal title in trust it must be clearly shown by the plaintiff that the Land Department, the facts being conceded misconstructed the law, that is the Act of Congress, as applied to the facts and gave to the patentee lands which under the Act of Congress really belonged to and should have been given the plaintiff.

Some of the cases from this court and the supreme court of the United States are as follows:

In case of *King v. Thompson*, 3 Okla. 644 it is stated:

"A court of equity will interfere after the matter has been finally determined in the Land Department by reason of the misapplication of law to the facts found by such officers, etc.

603 In *Thornton v. Peery*, 7 Okla. 441:

"Equity will interfere whenever it is clear that the land officers have by mistake of the law given to one man the land which under the undisputed facts belonged to another."

In *Payne v. Foster*, 9 Okla. 213:

"Equity will interfere whenever it is clear that the land officers

have by mistake of the law given to one man the land which under the undisputed facts belonged to another."

In the case of *United States v. Citizens Trading Co.*, 19 Okla. 585, it is stated:

"When there has been a manifest misapplication of the law to the facts found by such department."

See also case of *Leake v. Joslin*, 20 Okla. 200, where Justice Williams stated:

"Where there is no conflict as to the facts, but by a misconstruction of the law as applied to the facts the land department scheduled the lot to a party who was not entitled to same under the law."

See also *Ross v. Wright*, 20 Okla. 186.

In the case of *Twine v. Carey*, 2 Okla. 249, it is stated:

"But after title has passed to private parties equity will convert the holder of the legal title into a trustee of the true owner, if in equity and good conscience and by the laws of Congress and rules of the department thereunder it ought to have gone to another."

In *Baldwin v. Keith*, 13 Okla. 624:

"A petition in an action to declare a resulting trust which does not allege and show upon its face that the plaintiff has a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent, does not state facts sufficient to constitute a cause of action."

In other words, it must appear from a misconstruction where it is clear that an error of law has been committed that a court of equity will interfere.

As stated in the case of *Greenameyer v. Coats*, 18 Okla. 160, in substance, that the decision of the land department will not be disturbed unless their appears a clear misapplication of the law to such facts.

In the case of *Gourley v. Countryman*, 18 Okla. 220 it is stated:

"Where the land department by reason of error of law issued a patent for public land to one person when if the law had been correctly stated and applied said land would have been awarded to another person, a court of equity will interfere."

604 In the case of *Fearnow v. Jones*, 126 Pac. 1015, it is stated:

"When it is apparent that the land office has erred in the application of the law to the facts, etc."

The reports of the supreme court of the United States are full of decisions to the same effect.

But in Judge Ames' brief he says, in effect, that although the land department decided correctly under the Act of Congress, yet by reason of certain alleged equities growing out of the relation of parties existing long prior to the passage of the law, the court should disregard the Act of Congress in contravention and in conflict with the plain provision and intent of the Act of Congress impress this equity. In other words, although the land department has decided under the conceded facts in favor of and issued patent to the party who was entitled and whom the Act of Congress in-

tended should have the patent, yet the court should hold this was wrong by reason of the fact that Congress failed to recognize some alleged equitable right, although the acts of the Department were in perfect harmony with the Act of Congress and no error or mistake of law was made. No court has yet ever so held.

We respectfully submit that neither of the grounds alleged for a rehearing is sound and well taken and that said petition should be denied.

Respectfully submitted,

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,

*Attorneys for Defendant in Error.*

605 In the case of *Fearnow v. Jones*, 126 Pac. 1015, it is stated: "When it is apparent that the land office has erred in the application of the law to the facts, etc."

The reports of the Supreme Court of the United States are full of decisions to the same effect. But in Judge Ames' brief, he says, in effect, that although the land department decided correctly under the Act of Congress, yet, by reason of certain alleged equities growing out of the relation of parties existing long prior to the passage of the law, the court should disregard the Act of Congress and in contravention and in conflict with the plain provision and intent of the Act impress this equity. In other words, although the land department has decided under the conceded facts in favor of, and issued patent to, the party who the Act of Congress intended should have the patent, yet the court should hold this was wrong by reason of the fact that Congress failed to recognize some alleged equitable right, although the acts of the Department were in perfect harmony with the Act of Congress and no error or mistake of law was made. No court has yet ever so held.

Judge Ames says: "That it was wrong for Riddle to assert title hostile to that of Johnson." In this, he is in harmony with the position always heretofore occupied by Judge Potter, that Riddle was guilty of some fraud in asserting title to this property. To a lawyer acquainted with the conditions that existed in the Indian Territory at the time of the adoption of the Atoka Agreement, it is almost inconceivable, that counsel should assert such a doctrine; and it is explainable only upon the charitable view that Judge Potter and Judge Ames lived outside the Indian Territory, and were not, therefore, acquainted with conditions.

Judge Field in the Rector case, calls attention to the fact, that the legislation of Congress has uniformly been based upon a desire "to protect those who, in good faith, settled upon public land and made improvements thereon."

The Atoka Agreement was in harmony with this humane and just spirit, so universally practiced by Congress.

606 The trouble with counsel is, that they are either unwilling or unable to determine who is the bona fide pioneer. In the case at bar, who was the bona fide settler? Was it Fitzpatrick, who

had neither title to, nor possession of the lot, or was it Ellis, who erected substantial and valuable improvements? Who were the pioneers that the Atoka Agreement was endeavoring to protect? Were they the few landlords, who, without title rented vacant lots, and collected an annual rental therefrom, or were they the sturdy settlers, who builded the improvements and created cities?

Is it possible that Congress intended that the Indian landlords, who had been collecting annual rents from the occupants of lots in the town of Ardmore, for instance, should have the right to purchase all the lots at their appraised value, or was it the purpose of the treaty, that those who had erected the improvements upon these lots should have the right to purchase?

To state the proposition, is to answer it; and we repeat, that the position assumed by counsel for the plaintiff in error, is excusable, only upon the presumption, that they were unacquainted with the conditions that prevailed in the Indian Territory. In any view that may properly be taken of the case at bar, we assert, that the former opinion of this court, is the only one that could have been written.

Respectfully submitted,

C. B. STUART,  
W. A. LEDBETTER,  
A. C. CRUCE,

*Attorneys for Defendant in Error.*

607 Supreme Court, April Term, 1914, April 17th, 1914, Fourth Judicial Day.

No. 1190.

E. B. JOHNSON et al., Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

And now on this day it is ordered by the court that the petition for rehearing filed herein, be, and the same is hereby denied.

608 Filed May 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. JOHNSON and H. B. JOHNSON, and THE FIRST NATIONAL BANK BUILDING COMPANY, Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

*Order.*

Now on this the 5th day of May, 1914, came on to be heard the application of defendant in error in said cause to amend the record

and case-made filed in this court in said cause by having included therein the original petition for removal on behalf of said defendant from the State court to the Federal court, which was filed in the state court on March 28, 1908; also, the order of the Federal court in remanding said cause to the state court upon the application of said defendants, plaintiffs in error, which said order was made on the 30th day of November, 1908; and it appearing to the court that the attorneys have consented that said petition and order referred to may be included in the record and case-made in this court, it is therefore considered, ordered and adjudged by the court that the said petition for removal hereinabove, and the order and judgment of the Federal court remanding said cause to the state court, made on said 30th day of November, 1908, hereinabove referred to, be and the same are hereby ordered filed in this cause in this court, and to be made a part of the record and case-made therein. And thereafter, on the same day, came defendant in error, by his attorneys, and filed his application to be permitted to file his protest and objection to the allowance of a writ of error in this cause, 609 and the court being well and sufficiently advised in the premises, sustains said application.

It is therefore considered, ordered and adjudged by the court that said defendant in error be, and he is hereby granted leave to file his protest herein against the allowance of the writ of error, which said protest is hereby ordered to be filed and to be made a part of and included in the record in this cause.

Witness my hand and the seal of the court this the 5th day of May, 1914.

M. J. KANE,

*Chief Justice of the Supreme Court  
of the State of Oklahoma.*

Attest:

[SEAL.]

W. H. L. CAMPBELL, *Clerk,*

By JESSIE PARDOE, *Deputy.*

610 In the Supreme Court of the State of Oklahoma.

No. 1190.

E. B. JOHNSON, H. B. JOHNSON, and FIRST NATIONAL BANK BUILD-  
ING Co., Plaintiffs in Error,

vs.

F. E. RIDDLE, Defendant in Error.

Now comes the defendant in error, F. E. Riddle, and protests against the allowance of a writ of error herein for the following reasons, to-wit:

First. That heretofore, to-wit: on the 28th day of March, 1908, this cause was pending in the District Court of Grady county in the state of Oklahoma, and on said day and date, the plaintiffs in

error, E. B. Johnson, H. B. Johnson and the First National Bank Building Company, filed in said court their petition to remove said cause to the United States Circuit Court for the Eastern District of the State of Oklahoma, a copy of which motion is hereto annexed, marked exhibit "A" and made a part of this protest. For the reasons set forth in said petition for removal, the District Court in and for Grady county made the proper order for the removal of said cause to said United States Circuit Court for the Eastern District of Oklahoma; and thereafter, said cause was pending in said United States Circuit Court until the 30th day of November, 1909; that on or before said day and date, the said plaintiffs in error, F. B. Johnson, H. B. Johnson and the First National Bank Building Company filed in said United States Circuit Court their petition and motion to remand said cause to the District court in and for Grady county, State of Oklahoma, and set up in said motion and petition that there was no Federal question in said cause, and that said United States Circuit Court was without jurisdiction to hear and determine same; and said plaintiffs in error, E. B. Johnson and H. B. Johnson and the

611 First National Bank Building Company abandoned all the grounds set forth in their petition for removal, which is hereto annexed, marked exhibit "A," and thereby induced the said United States Circuit Court to remand said cause to the State Court, and induce said court to find that neither the original petition, amended petition, or supplemental petition of the plaintiffs shows necessarily any construction of the act of Congress, or any treaty or law of the United States to be involved in said cause; and that the main question involved in said cause, under the act of Congress, is as to the ownership of improvements situated upon the lot in question and involved in said cause at the time the same was scheduled to the plaintiff, defendant in error, F. E. Riddle in said cause; and that under the said act of Congress, the only question involved was as to the ownership of said improvements, the owner thereof being entitled to purchase said lot. A copy of said order remanding said cause to the district court in and for Grady county, State of Oklahoma, is attached hereto, marked Exhibit "B" and made a part hereof.

Second. The said defendant in error, F. E. Riddle, further protests against the allowance of the writ herein, for the reason that plaintiffs in error are estopped by their conduct herein and by their motion and petition to remand said cause to the state court, and by inducing the said United States Circuit Court to hold that the cause did not involve the construction of any act of Congress or law or the United States or treaty with any Indian tribe, but that the sole question in the case was the ownership of the improvements on the lot in controversy; and that it would be inequitable and unlawful for the court at this time to permit the said plaintiffs in error to reverse their position and contention with respect to the existence in this cause of a Federal question, and thereby procure the writ of error, as prayed for.

It appears from the record in this cause that the said plaintiffs



612 in error have been trifling with the courts; that they caused said cause to be removed to the United States Court for the Eastern District of Oklahoma for the several grounds set forth in said motion, and thereafter induced said court to remand the cause to the state court, and after said cause had remained in the state court ever since the 30th day of November, 1908, and said cause has been finally decided against plaintiffs in error in the Supreme Court of the State of Oklahoma, they now seek to return to the grounds and contention set forth in their motion to remand said cause from the district court of Grady county to the United States Circuit Court for the Eastern District of Oklahoma, and contend that the cause involves the construction of a law of the United States, and that a Federal question is involved herein, which may be reviewed in the Supreme Court of the United States.

Third. It does not appear from the record in this case that there is in fact a Federal question, within the appellate jurisdiction of the Supreme Court of the United States; but, on the contrary, it does appear that the controlling question in the case was and is the ownership of the improvements on the lot in question at the time the lot was scheduled for purchase under the provisions of the treaty between the Choctaw and Chickasaw Indians and the United States, and that the controlling question in this case is one of fact, and not of law.

Wherefore, defendant in error, F. E. Riddle, protests against the allowance of the writ of error herein, and prays that the same be denied by the Chief Justice and by this Court.

[SEAL.]

A. C. CRUCE &  
C. B. STUART.  
W. A. LEDBETTER.

F. E. Riddle, after being duly sworn on oath, says: That I am defendant in error in above styled cause, and that the allegations of fact contained in above and foregoing protest against the allowance of a writ of error are true, as I verily believe.

F. E. RIDDLE.

Subscribed and sworn to before me this the 7th day of May, 1914.

C. L. WILLIAMS,  
*Notary Public.*

613

## EXHIBIT "A."

In the District Court within and for the County of Grady, State of Oklahoma, Fifteenth Judicial District.

No. 762.

F. E. RIDDLE et al., Plaintiffs,  
vs.  
W. D. BELL et al., Defendants.

*Petition for Removal.*

To the Honorable District Court of Grady County, Oklahoma:

Your petitioners, W. D. Bell, Thomas Sinclair, James Rechief, Theodore Fitzpatrick, R. M. Bourland, Ella Cross, H. B. Johnson, E. B. Johnson, and the First National Bank Building Company, a corporation, of Chickasha, Oklahoma, the defendants in the above styled cause, would respectfully show to this court:

First. That the cause of action in this case arises under a law of the United States.

Second. That this controversy involves the title to a town low in the town of Chickasha, Oklahoma, which title arises out of the Act of Congress, authorizing and providing for the sale and disposition of town lots in cities and towns in the Indian Territory.

Third. That a determination of the issues involved in this case depends upon the construction to be given to an Act of the United States Congress.

Fourth. That this plaintiffs and defendants are contending in this action for a different construction of an Act of Congress, and upon the construction of such Act depends the question of whether or not plaintiffs or defendants are the owners of the title to a town lot.

Fifth. That the property involved in this action exceeds in value the sum of \$2000.00.

Sixth. That all the matters alleged in this Petition appear from the pleadings, evidence, and report of the special Master in this cause.

Seventh. Petitioners herewith present a good and sufficient Bond, as provided by law, conditioned that they will on or before the first day of the next ensuing term of the United States Circuit

614 Court for the Eastern District of the State of Oklahoma file therein a Transcript of the records in this action and for the payment of all costs which may be awarded by the said Circuit Court, if it shall be held that this suit was wrongfully or improperly removed.

Wherefore, your petitioners pray that this cause be removed to the United States Circuit Court for the Eastern District of Oklahoma, and that this Court make the Order for such removal as required by law, and accept the Bond presented herewith, and direct a transcript

of the records herein to be made for said Circuit Court, as the law provides, and in duty bound your petitioners will ever pray.

BOND & MELTON,  
C. C. POTTER,  
*Attorneys for Petitioners.*

COUNTY OF GRADY,  
*State of Oklahoma:*

H. B. Johnson, being first duly sworn, on his oath says that he is one of the defendants in the above entitled cause, and one of the petitioners named in the foregoing Petition; that he has ready such Petition and that the facts therein set forth are true.

H. B. JOHNSON.

Subscribed and sworn to before me this the — day of —, 1908.  
\_\_\_\_\_  
*Notary Public.*

Endorsed: No. 241. U. S. Circuit Court. No. 762. F. E. Riddle, et al. vs. W. D. Belt, et al., Petition for Removal. No. 8. Filed at Chickasha, Okla., Mar. 28, 1908. J. R. Callahan, District Clerk, Grady County, Okla. Filed May 19/08. L. G. Disney, Cl'k, by Florence Hammersly, D. C. Bond & Melton and C. C. Potter, for def'ts. 371. Filed Mar. 6, 1909, at — o'clock — M., C. T. Vernon, Clerk, District Court, Carter County, Oklahoma.

615

EXHIBIT "B."

Be it Remembered, That on to-wit, *on* the 30th day of November A. D. 1908, the same being one of the days of the regular Chickasha 1908 term, of the United States Circuit Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Chickasha, Oklahoma, Present and Presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following to-wit:

No. 241. Law.

F. E. RIDDLE

vs.

W. D. BELL et al.

Now on this 30th day of November, 1908, came on to be heard at Chickasha, in open court, the motion and petition of the defendants herein to have the above entitled cause referred and transferred to the state court, and said matter having been presented and argued to the court, and the Court being well and sufficiently advised in the premises is of the opinion that said motion is well taken and should be granted, for the following reasons:

The Court find after examining all of said pleadings in said cause that neither the original petition, amended or supplemental petition of plaintiff shows necessarily any construction of the Act of Congress or any Treaty or law of the United States involved in said cause, and that it appearing to the Court from said pleadings that the main question involved in said cause, under the Act of Congress is as to the ownership of improvements situated upon the lot in question and involved in said cause at the time the same was scheduled to the plaintiff in said cause, and that under the Act of Congress the only question was as to the ownership of said improvements the owner thereof being entitled to purchase said lot.

616 It is therefore considered, ordered and adjudged by the Court that said cause be and the same is hereby re-transferred to the state court of the State of Oklahoma.

Done in open court at Chickasha, this 30th day of November, 1908.

RALPH E. CAMPBELL,  
Judge U. S. Circuit Court,  
Eastern District of Oklahoma.

UNITED STATES OF AMERICA,  
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the above order made and entered in this cause on the 30th day of November, 1908, as the same appears from the record in my office.

Witness my hand and the seal of said Court, at Muskogee, Oklahoma, this 25th day of April, A. D. 1914.

[SEAL.]

R. P. HARRISON, *Clerk*,  
By H. E. BOUDINOT, *Deputy*.

Endorsed: No. 1190. E. B. Johnson, et al., Plaintiffs in er. vs. F. E. Riddle, Defendant in Error. Protest against granting Writ of Error. Filed May 7, 1914. W. H. L. Campbell, Clerk.

617 In the Supreme Court of the State of Oklahoma.

*Certificate of Clerk.*

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 616 pages, numbered from 1 to 616, both inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court, in the case of E. B. Johnson, H. B. Johnson, and First National Bank Building Company, Plaintiffs in Error, vs. F. E. Riddle, Defendant in Error, as the same remain on file and of record in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Court at Oklahoma City, this the 20th day of May, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk*,  
By JESSIE PARDOE, *Deputy*.

Endorsed on cover: File No. 24,237. Oklahoma Supreme Court Term No. 498. E. B. Johnson, H. B. Johnson, and First National Bank Building Company, plaintiffs in error, vs. F. E. Riddle. Filed May 25th, 1914. File No. 24,237.

FILED  
JAN 28 1915  
JAMES D. MAHONEY  
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In the  
**Supreme Court of the United States**

October Term, 1914

E. B. Johnson et al.,  
*Plaintiffs in Error*  
vs.

F. E. Riddle,  
*Defendant in Error*

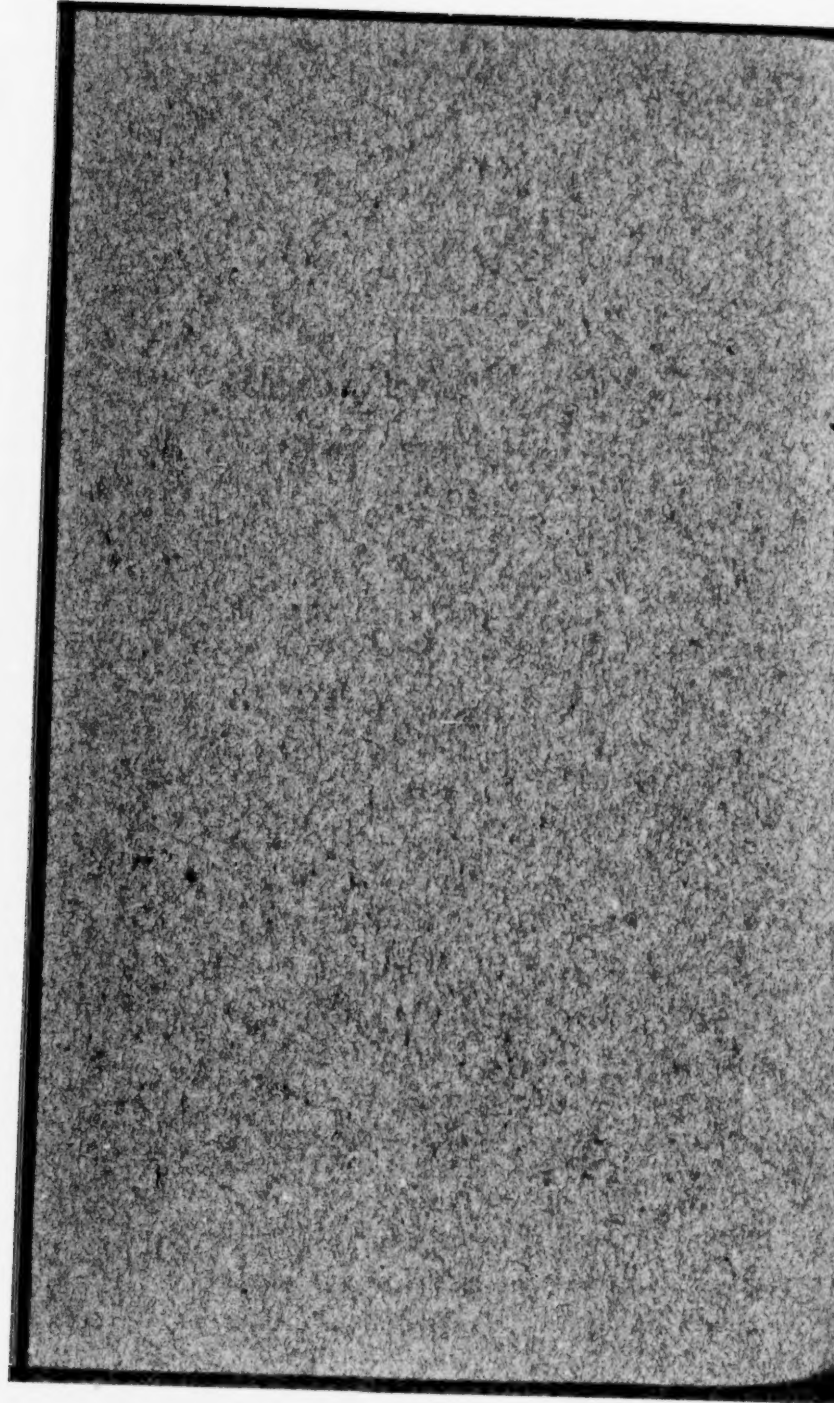
No. 161

**MOTION TO ADVANCE**

C. B. Ames,  
Amos Melton,  
*Attorneys for Plaintiffs in Error*

AMES, CHAMBERLAIN, LOWE & BISHAMPOON,  
BOND, MELTON & MELTON,  
*Of Counsel*

Oklahoma Law Book Company, 125 W. Third St., Oklahoma City.





*In the*  
**Supreme Court of the United States**

**October Term, 1914**

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E. B. Johnson *et al.*,  
*Plaintiffs in Error*,  
vs.

F. E. Riddle,  
*Defendant in Error.*

} **No. 498**

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**MOTION TO ADVANCE**

Come now the plaintiffs in error in the above entitled cause and move the court to advance said cause and hear the same on the merits at the same time and in connection with the motion to dismiss the writ of error filed herein by the defendant in error.

The matter involved in this cause is the construction of that provision of the treaty between the United States and the Chickasaw and Choctaw

Indians known as the Atoka Agreement (30 Statutes at Large, page 508), which permitted the owners of the improvements on town lots in those nations to buy the lots at 50 per cent of their appraised value. The defendant in error and his predecessors in interest, prior to the passage of the Atoka Agreement, were the tenants of the plaintiffs in error and their predecessors. When the Atoka Agreement was passed the tenants declined to further pay rent and claimed the right to acquire title to the lot. The landlord brought an action of unlawful detainer and secured judgment, but while this case was pending on appeal the tenant had the lot scheduled to him, the town-site commissioners being of the opinion that the Atoka Agreement abrogated the tenancy. After the landlord acquired possession in the unlawful detainer case, the tenant, having in the meantime secured a deed to the lot from the Chickasaw Nation, brought this action of ejectment, in which the landlord filed a cross-complaint seeking to have the tenant declared trustee of the title for his benefit. The tenant won the case in the Supreme Court of Oklahoma and the landlord has brought this writ of error.

The tenant (defendant in error) has filed a motion to dismiss for want of a sufficient Federal

question, and the landlord (plaintiffs in error) now moves the court to advance the case for hearing on the merits for the reason that the court can determine the case on the merits as easily as it can determine the motion to dismiss. When the court examines the record with sufficient care to determine the existence of a Federal question it will at the same time be able to decide that question, and therefore the motion to dismiss for practical purposes involves the merits of the case.

Wherefore the plaintiffs in error respectfully pray that the court advance the case for hearing on the merits at the same time as the motion to dismiss.

C. B. AMES,  
ALGER MELTON,

*Attorneys for Plaintiffs in Error.*

AMES, CHAMBERS, LOWE & RICHARDSON,  
BOND, MELTON & MELTON,

*Of Counsel.*



3  
JAN 26 1915

JAMES D. MAHER

CLERK

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*In the*  
**Supreme Court of the United States**

**October Term, 1914**

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E. B. Johnson *et al.*,

*Plaintiffs in Error,*

vs.

F. E. Riddle,

*Defendant in Error.*

No.  16

---

**Brief of Plaintiffs in Error on the Merits and  
in Opposition to the Motion of Defendant  
in Error to Dismiss the  
Writ of Error.**

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C. B. AMES,

ALGER MELTON,

*Attorneys for Plaintiffs in Error.*

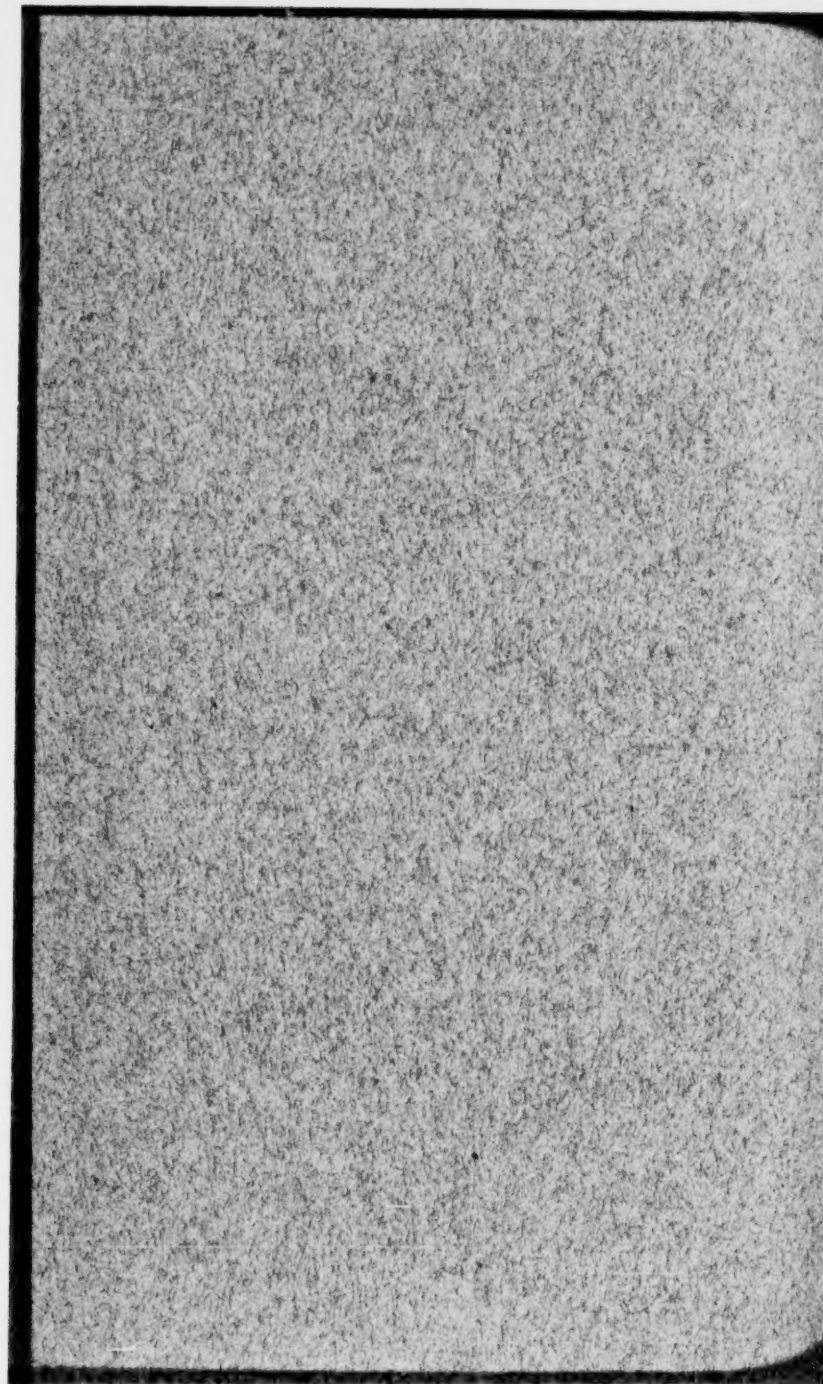
AMES, CHAMBERS, LOWE & RICHARDSON,

BOND, MELTON & MELTON,

*Of Counsel.*

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Oklahoma Law Brief Company, 120 W. Third St., Oklahoma City.



*In the*  
**Supreme Court of the United States**

**October Term, 1914**

---

E. B. Johnson *et al.*,  
                    *Plaintiffs in Error*,  
vs.  
F. E. Riddle,  
                    *Defendant in Error.*

} **No. 498**

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**Brief of Plaintiffs in Error on the Merits and  
in Opposition to the Motion of Defendant  
in Error to Dismiss the  
Writ of Error.**

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This cause is pending on a writ of error to the Supreme Court of Oklahoma to review a decision holding that under the Atoka Agreement a tenant erecting improvements on a town lot in Chickasha, Indian Territory, could acquire title



to the lot notwithstanding the fact that he withholds possession from his landlord in violation of law.

The defendant in error has filed a motion to dismiss the writ of error or affirm the judgment of the court below for want of a sufficient federal question. We believe that it will be impossible for the court to decide the motion without a definite conclusion on the merits, because when the court determines the exact nature of the question involved it will necessarily reach a conclusion on that question. To ascertain the question involved will require substantially as careful an investigation of the record as to decide the case on the merits, and we have, therefore, filed a motion to advance the cause and submit it on the merits at the time that it is submitted on the motion. We shall, therefore, brief the case on the merits first, and after so doing will add such remarks as we think are pertinent to the motion.

This litigation involves the rights of landlord and tenant under the provision of the Atoka Agreement permitting the owner of improvements on a town lot to purchase the same at a reduced price. There have been various changes of in-

terest since the litigation commenced, and it will be unnecessary labor for the court to familiarize themselves with all of these details. In discussing the case, therefore, we shall refer to the plaintiffs in error and their predecessors as the landlord and to the defendant in error and his predecessors as the tenant.

The litigation over the subject-matter has continued since July 7, 1898, and falls into three parts:

The first was an action by the landlord in unlawful detainer to recover possession of the lot in controversy. This was commenced in the United States District Court of the Indian Territory on July 7, 1898. It pursued its way through the District Court, the Court of Appeals of the Indian Territory, and the United States Circuit Court of Appeals of the Eighth Circuit, and finally resulted in a victory at all points for the landlord and the delivery of possession to him in January, 1903.

The second part of the litigation was before the Townsite Commission for the Indian Territory, the Commissioner of Indian Affairs and the Secretary of the Interior. In scheduling the town lots in Chickasha the townsite commission origin-

ally listed this one as "in litigation." Thereafter the tenant (a lawyer), without the knowledge of the landlord, represented to the agent of the commission in charge of the schedule that the litigation merely affected the possession of the lot and did not effect the ownership of the improvements and thereby induced the agent to erase "in litigation" and schedule the lot to him. The Commissioner of Indian Affairs entertained the view that by the Atoka Agreement all rights of the landlord in the premises were abrogated, notwithstanding the contract between him and his tenant that the relation of landlord and tenant was by that act annulled, and consequently the patent was issued to the tenant. This is an action against the landlord, the tenant claiming the legal title by virtue of his deed from the Chickasaw Nation. The landlord by cross complaint seeks to hold the tenant as trustee of a resulting trust on account of the fact that the deed from the Chickasaw Nation should have issued to him instead of the tenant. This branch of the litigation was commenced on February 3, 1903.

A chronological statement of the facts will aid in reaching a clear understanding.

- In 1892 the landlord was in possession of the

lot in controversy, which was at that time vacant and unimproved. He rented the lot to the tenant for \$10 a month, the tenant reserving the right to improve and remove his improvements. The tenant continued paying the rent until after the Atoka Agreement.

On April 23, 1897, the Dawes Commission and representatives of the Choctaw and Chickasaw tribes made the Atoka Agreement, which was subsequently incorporated as section 29 of the Act of June 28, 1898, familiarly known as the Curtis Act (30 Stat. at Large, 505). This agreement provided for preferential purchase of town lots by the owner of the improvements thereon.

About April 1, 1898, the tenant declined to pay further rent, and on July 7, 1898, the landlord brought the action of unlawful detainer hereinbefore mentioned. On October 20, 1900, he recovered judgment in this action, which was affirmed on October 1, 1901, by the Court of Appeals of the Indian Territory. *Ellis v. Fitzpatrick*, 64 S. W. 567, and this decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit on October 27, 1902 (118 Fed. 430).

On February 8, 1902, the townsite commission for the Chickasaw Nation was organized, and shortly thereafter commenced scheduling lots in Chickasha. As previously stated this lot was marked "in litigation." On March 26, 1902, the present defendant in error (a lawyer who had been representing the tenant from the commencement of the cause) purchased the improvements from the tenant and on the same day presented his bill of sale to the agent in charge of the schedule, representing to this agent that the litigation pending only involved possessory rights and did not involve title to improvements, and thereby caused the lot to be scheduled to him.

In January, 1903, the landlord, pursuant to the decree in the unlawful detainer case, procured possession of the lot and on February 3, 1903, the tenant commenced this action in ejectment.

The trial court gave judgment for the tenant and an appeal was taken to the Supreme Court of Oklahoma, which originally reversed the judgment but on re-hearing affirmed it.

The original opinion was written by Roser, Commissioner, and commences at page 253 of the printed record. The final opinion was written by

Brewer, Commissioner, and commences at page 279 of the record. Both of these opinions contain a full statement of the facts and will relieve this court of the necessity of reviewing the record.

## ASSIGNMENT OF ERRORS

The errors assigned are as follows:

1. The Supreme Court of the State of Oklahoma committed error in affirming the judgment of the District Court of Carter County entering judgment in said cause in favor of the defendant in error and against the plaintiffs in error.

2. The Supreme Court of the State of Oklahoma committed error in holding that the Act of Congress of June 28, 1898, known as the Atoka Agreement, permitted a tenant wrongfully holding possession against his landlord to take advantage of that possession to secure title as against his landlord.

3. The Supreme Court of the State of Oklahoma committed error in denying the right and title set up and claimed by the plaintiffs in error under and by virtue of the Act of Congress of June 28, 1898, known as the Atoka Agreement.

4. The Supreme Court of Oklahoma erred in holding that under the provisions of the Act of Congress approved June 28, 1898, known as the Atoka Agreement, it was the duty of the Townsite Commission to schedule town lots to the



person who owned the improvements regardless of the question of former possession or previous holding or the nature or legality of such owner's possession.

5. The Supreme Court of the State of Oklahoma committed error in denying to the plaintiffs in error the relief sought by their answer and cross-petition in said cause.

### **Points and Authorities**

1.

The decision of the townsite board as approved by the secretary of the interior was based on an erroneous proposition, to-wit, that the effect of the **Atoka Agreement** was to terminate the relation of landlord and tenant.

*Ellis v. Fitzpatrick*, 64 S. W. 567.7

*Ellis v. Fitzpatrick*, 118 Fed. 430.

*Fraer v. Washington*, 125 Fed. 280.

*Shy v. Brockhouse*, 7 Okla. 35.

*Walker Trading Co. v. Grady Trading Co.* (I. T.), 39 S. W. 354.

*Kelly v. Johnson* (I. T.), 39 S. W. 352.

*Williams v. Works*, 76 S. W. 246.

2.

Under the Atoka Agreement as embodied in the Curtis Act (30 Statutes at Large 505-508), which provides that the owner of the improvements shall have the right to buy one residence and one business lot at fifty per cent of the appraised value, a tenant who has wrongfully withheld possession of such a lot from his landlord, thereby preventing his landlord from erecting improvements thereon, cannot acquire title to the lot as against the landlord.

*Rector v. Gibbon*, 111 U. S. 276.

*Lamb v. Davenport*, 18 Wallace 307.

*Atherton v. Fowler*, 96 U. S. 513.

*Ricks v. Reed*, 19 Cal. 551.

*Goode v. Gains*, 145 U. S. 141.

*Trenouth v. San Francisco*, 100 U. S. 251.

*Hagar v. Wikoff*, 2 Okla. 580.

*Downman v. Saunders*, 3 Okla. 227.

3.

The tenant having acquired a deed in violation of the rights of his landlord holds the title as trustee for his landlord.

*Rector v. Gibbon*, 111 U. S. 276.

*Baldwin v. Clark*, 107 U. S. 463.

*Wallace v. Adams*, 143 Fed. 716.

*James v. Germania Iron Co.*, 107 Fed. 597.

*Trice v. Comstock*, 121 Fed. 620.

*Bertran v. Cook*, 32 Mich. 518.

## ARGUMENT

The decision of the townsite board as approved by the secretary of the interior was based on an erroneous proposition, to-wit, that the effect of the **Atoka Agreement** was to terminate the relation of landlord and tenant.

*Ellis v. Fitzpatrick*, 64 S. W. 567.

*Ellis v. Fitzpatrick*, 118 Fed. 430.

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*Shy v. Brockhouse*, 7 Okla. 35.

*Walker Trading Co. v. Grady Trading Co.* (I. T.), 39 S. W. 354.

*Kelly v. Johnson* (I. T.), 39 S. W. 352.

*Williams v. Works*, 76 S. W. 246.

The exact ground on which the Commissioner of Indian Affairs held that the tenant was entitled to the deed to this lot appears at page 84 of the record (marginal page 160). In the opinion of C. F. Larrabe, acting commissioner, he says:

“The title to the lot in controversy at the time Fitzpatrick set up claim to it, and when Barnhart and Ellis entered under him, was in the Chickasaw Nation, and he had no improvements thereon, the claims of these parties did not divest it of title. They were not even tenants at sufferance. They were mere trespassers and occupied the lot in direct violation of Section 2118, Revised Statutes. The lot which they both claimed was the property of the nation and subject to such laws as

Congress might choose to enact. On June 28th, 1898, the Atoka Agreement became effective. By its provisions the owner of the improvements on town lots was given the right to purchase on certain conditions. It also declared that all unimproved lots should be sold at public auction and the proceeds turned over to the nation. The town lots in Chickasha became subject to that law from and after its passage. The idea of any person holding or being allowed to purchase, except at auction, property on which he owned no improvements is negatived by the terms of the Act. A certain species of rights were recognized and no other. For a claimant to fail to come within the provisions of the law leaves no alternative but to schedule the lot to one who does come within its provisions—the owner of the improvements, or sell it at public auction, if unimproved. The law is clear and unequivocal on this point. *Fitzpatrick's rights in the lot in controversy were extinguished by operation of law on June 28, 1898, as he owned no improvements thereon at that time. Ellis, as actual occupant of the lot, from and after that date, by operation of law ceased to be tenant of Fitzpatrick and Congress having declared Fitzpatrick's claim at an end, had by virtue of his ownership of the improvements, an indefeasible right in law to purchase it."*

*Ellis v. Fitzpatrick* (I. T.), 64 S. W. 567, is the decision of the Circuit Court of Appeals of the Indian Territory on the unlawful detainer branch of this case. The point held by the Com-

missioner of Indian Affairs is there decided exactly to the contrary, as appears from the following quotation from page 568:

“As to the first paragraph of the demurrer, we know of no law which permits a tenant to deny the title of his landlord, under whom he entered, because of the fact that there were no valuable improvements on the leased premises. *It is true that under the Atoka agreement a claimant to a town lot, before he can become the owner of it, must have upon it valuable and lasting improvements; but before he can put the improvements upon it he must obtain possession of it,* and in this case one of the purposes for which the plaintiff brought his suit against his delinquent tenant, as alleged in his complaint, was that he might avail himself of the benefits of the Atoka Agreement by placing improvements upon the lot and thus enable himself to become its absolute owner. *Besides, the tenant in this case, after obtaining possession of the lot under the lease, put upon it valuable and lasting improvements, which, as between the parties to the lease, inured to the benefit of the landlord.* It may have been that the very object of the landlord in leasing the lot was to have it improved by his tenant, so that he might be able, under the peculiar conditions that existed here, to hold it as against every title except that of the Indian nation. Whether this was the intention or not in law it had that effect. The possession of the tenant is that of his landlord. *There is no merit in the position taken by appellant's counsel that the Atoka agreement annulled and abrogated the validity of the leases between white men*

of town lots in the Choctaw and Chickasaw Nations. On the contrary, if it had any effect on this class of contracts at all, it was to validate them. It is by the agreement alone that we find statutory authority for white men to hold town lots in these nations; and when the agreement was entered into, recognizing the validity of these holdings and providing a method for transferring title, all objections to the invalidity of contracts between white men in relation to the possession of these lots were overcome. *It mattered not to the Indian who made the improvement or was entitled to buy the lots; and, as to the white man, the possession of the tenant was that of the landlord, and he could not deny his title to the premises, whether improved or not.* The complaint alleges possession in the plaintiff at the time of the execution of the lease, a lease of the premises to the defendant, an entry by the defendant under the lease, a termination of the lease, and a refusal to surrender possession of the premises after demand. And ordinarily this is all that is required. The rule is that a tenant cannot deny his landlord's title, although he (the landlord) may have none; nor is it necessary that the landlord, at the time of the execution of the lease, should have been in possession. It is sufficient if the tenant entered peaceably under the lease and paid rent. 1 Wood, Landl. & Ten. §231. The question involved under the first paragraph of the demurrer has been decided adversely to the appellant's contention by this court in the cases of *Kellen v. Johnson*, 1 Ind. T. 184, 39 S. W. 352, and *Walker Trading Co. v. Grady Trading Co.*, 1 Ind. T. 191, 39 S. W. 354. And we adhere to those decisions."

In *Ellis v. Fitzpatrick*, 118 Fed. 430, the Circuit Court of Appeals for the Eighth Circuit expressly affirmed the rule laid down by the Indian Territory Court of Appeals, as is shown by the following quotation from page 432:

“We are aware of no rule of law which permits a tenant to deny the title of his landlord for that reason. By receiving possession of land from the landlord, of which he was in peaceable possession at the time of the demise, and by engaging to pay rent therefor, and by actually paying it, the tenant estops himself from denying or finding fault with his landlord's title. This rule should be applied in the Indian Territory, as it is elsewhere, especially when, as in the case at bar, the controversy is between citizens of the United States who are not members of any Indian tribe, either by nativity or adoption. The United States Court of Appeals in the Indian Territory decided (*Ellis v. Fitzpatrick*, 64 S. W. 567) that there was no merit in the defendant's contention that the Atoka Agreement, so termed (*vide* 30, Stat. 495, 500, c. 517), annulled all leases between white men of town lots in the Choctaw and Chickasaw Nations. It also said, in substance, that, if the act in question had any effect on such contracts, its effect was rather to validate them, in that it recognized the validity of such holdings by white men in towns and villages and provided a means for the transference of the legal title, thereby removing any objection which might theretofore have been urged against the validity of such contracts between white men. We are of the



opinion that this was a correct view of the act in question, and that nothing therein contained can be held to justify the contention that Ellis was entitled to challenge his landlord's title because it was not alleged that permanent improvements had been erected on the demised premises."

It is unnecessary to multiply quotations. Each of the authorities cited on this point supports the rule, and it has become a settled rule of construction of the Atoka Agreement.

Even if it were otherwise, it is the law of this case.

Nor does the Supreme Court of Oklahoma hold otherwise, and we merely state the point as preliminary to the next proposition, which is the important one.

2.

Under the Atoka Agreement as embodied in the Curtis Act (30 Statutes at Large 505-508), which provides that the owner of the improvements shall have the right to buy one residence and one business lot at fifty per cent of the appraised value, a tenant who has wrongfully withheld possession of such a lot from his landlord, thereby preventing his landlord from erecting improvements thereon cannot acquire title to the lot as against the landlord.

*Rector v. Gibbon*, 111 U. S. 276.

*Lamb v. Davenport*, 18 Wallace 307.

*Atherton v. Fowler*, 96 U. S. 513.

*Ricks v. Reed*, 19 Cal. 551.

*Goode v. Gains*, 145 U. S. 141.

*Trenouth v. San Francisco*, 100 U. S. 251.

*Hagar v. Wikoff*, 2 Okla. 580.

*Downman v. Saunders*, 3 Okla. 227.

The rule finally adopted by the Supreme Court of Oklahoma in this case construes the Atoka Agreement as permitting the owner of the improvements to acquire the lot regardless of any question of former possession or the rightfulness of the ownership.

The language of the Atoka Agreement is as follows (30 St. at L. 505, 508):

“When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within

ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same."

It will be remembered that the landlord had a judgment of possession in the unlawful detainer case, and that this judgment had been affirmed by the Court of Appeals in the Indian Territory before the lot was scheduled to the tenant. The tenant's possession was therefore wrongful. If he had surrendered possession to his landlord, improvements would have been lawfully erected upon the premises and title acquired. The landlord had the right to the possession. The tenant had no right to the possession. The landlord had a right to place improvements on the lot. The tenant has no right to retain the improvements on the lot. If the previous possession and the rightful holding of the parties is to be ignored and the Act of Congress means that, regardless of all the previous principles of law, the mere naked ownership of improvements entitles one to purchase, then the strong arm is substituted for the law. One might forcibly enter upon premises, destroy and remove the improvements rightfully

there, erect improvements of his own and thereby acquire a right to purchase at half price. It does not seem to us that the language of the Atoka Agreement is susceptible of this construction. It seems to us that ownership of the improvements necessarily means a lawful ownership. Could a man be said to be the owner of improvements if he had, with force and arms, entered upon a lot, destroyed the rightful owner's improvements and by protection of force erected his own?

In passing we call attention at this point to the fact that the vital point in this case is therefore the construction of the Atoka Agreement.

The case of *Rector v. Gibbon*, 111 U. S. 276, it seems to us, is conclusive on this point:

This case involved the right to a patent to a lot in Hot Springs, Arkansas, under the Act of Congress of March 3, 1877 (19 St. at L. 377). This act created a board of commissioners to lay out the Hot Springs reservation and gave to the occupants of the lots the prior right of purchase. The 5th section of the act is as follows:

“That it shall be the duty of said commissioners to show by metes and bounds on the map herein provided for the parcels or tracts of land claimed by reason of improvements made thereon or occupied by each and every

such claimant and occupant on said reservation; to hear any and all such proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value which shall be fixed by said commissioners: *Provided*, however, that such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six."

Prior to the passage of this act, Rector leased the lot in controversy to Gibbon at an annual rent of \$500.00 and \$1500.00 additional for water privileges for a term commencing Feb. 21, 1873, and ending May 21, 1876. The lease contained a proviso that the lessor upon certain conditions might re-enter by paying for the improvements. The lessor sought re-entry, but the leasee by failing to give an inventory of certain hotel furniture prevented the amount of payment being ascertained and thereby retained possession. The townsite commission awarded the right to purchase to the lessees, although they had acquired possession under this lease. There were various

changes of the title during the years involved, which we do not note. After the title was awarded to the lessee the lessor brought an action to charge the lessees as trustees of the land and to compel conveyance. The Supreme Court of the United States, in an opinion by Justice Field, granted the relief sought. It seems to us that the principle involved in that case is conclusive of the case at bar. In discussing the respective rights of the lessor and the lessee, Justice Field says:

“But lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease. They, therefore, while retaining possession, are estopped to deny his rights. *Blight's Lessee v. Rochester*, 7 Wheat. 534. This rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment. The lessees in this case, and those deriving their interest under them, could, therefore, claim nothing against the plaintiff by virtue either of their possession, for it was in law his possession, or of their improvements, for they were in law his improvements, and entitled him to all the benefits they conferred, whether by pre-emption or otherwise. What-

ever the lessees and those under them did by way of improvement on the leased premises, inured to his benefit as absolutely and effectually as though done by himself."

Justice Field then proceeds to a discussion of the reason why Congress passed the act of 1877, and this reasoning applies with exactness to the situation in the Indian Territory, at the time of the Atoka Agreement. He says:

"Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon, and not those who, by violence or fraud or breaches of contract, intruded upon the possession of original settlers and endeavored to appropriate the benefits of their labors. There has been in this respect, in the whole legislation of the country, a consistent observance of the rules of natural right and justice. There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields of enterprise have been opened, population has spread over the public lands, villages and towns have sprung up on them, and all the industries and institutions of a civilized and prosperous people have been established, with the church and school house by their side, before the surveyor with his quadrant and line appeared. With absolute con-



fidence these pioneers have relied upon the justice of their government, and they have never been disappointed.”

He then reviews the conditions in California and Oregon which gave rise to litigation similar to this, and quotes with approval from the California case of *Ricks v. Reed*. In that case the act of Congress relative to town lots was passed for the benefit ‘of the occupants thereof,’ and the language of the Supreme Court of California, as approved by Justice Field, is in direct conflict with the opinion last handed down in this case. Justice Field says:

“In *Ricks v. Reed*, decided in 1862, the proper construction of the act was a question before the Supreme Court of California, and the court said: ‘It is true, the entry of the town lands by the corporate authorities or county judge is, under the act of congress, “in true for the several use and benefit of the occupants thereof, according to their respective interests;” but this provision does not establish that it was the intention of Congress to give the benefits of entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original *bona fide* settlers of the premises and improvements in favor of those who had, by force or otherwise, intruded upon their settlement. Were such the effect of the provision in question, the trespasser of yesterday or the tenant of today would often be in better position than the parties who, by their previous

occupation and industry, had built up the town and made the property valuable. We do not think Congress could have contemplated that results of this nature should follow from its legislation, but, on the contrary, that it intended that the original and *bona fide* occupants should be the recipients of the benefits of the entry to the extent, at least, of their interest, that is, their actual occupancy and improvements,' 19 Cal. 551, 755."

We call particular attention to the fact that in this quotation "the tenant of today" is put in the same class as the "trespasser of yesterday." Justice Field again says:

"The statute, in requiring the commissioners to 'finally determine the right of each claimant or occupant to purchase' parts of the reservation, recognizes the existence of rights as between different claimants, though equally without title so far as the government is concerned. *But in their decision they have ignored the universally acknowledged right as between landlord and tenants, giving to the latter what could by no possibility belong to them in the relation which they occupied.*"

The words underlined in this last quotation are exactly applicable to the case at bar and show beyond controversy that the Oklahoma court is wrong in saying that it was the intention of Congress in passing the Atoka Agreement to ignore the relation between landlord and tenant, or the prior rights of the parties.

After referring to the leading case of *Johnson v. Towsley*, 13 Wall. 72, and quoting from Mr. Justice Miller's opinion, holding that the decision of the land office authorities is subject to review by the courts, Mr. Justice Field says:

“The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party, when in equity and in good conscience, and by the laws of Congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner and compel him to convey the legal title.”

The decisions of the Supreme Court of the Territory of Oklahoma in *Hagar v. Wikoff*, 2 Okla. 580, and *Bowman v. Saunders*, 3 Okla. 227, construe the townsite act for Oklahoma Territory and lay down rules which appear to us to be in direct conflict with the present decision of the Supreme Court of Oklahoma.

The act to provide for townsite entries in the Territory of Oklahoma was under consideration in both of those cases. It is the act of Congress of May 14, 1890, and is found at page 64 of the Statutes of Oklahoma of 1893. It provides that certain public lands situated in the Territory of Oklahoma “\* \* \* may be entered as town-

sites for the several use and benefit of the occupants thereof by three trustees to be appointed by the Secretary of the Interior for the purpose \* \* \*” Sec. 7 of the act empowers the trustees to hear and determine all controversies arising and to execute conveyances. It will be noted that the townsites are entered for the “benefit of the occupants thereof.” “Occupants” is no more elastic a term than “owner of the improvements,” and the townsite act does not give the trustee any more discretion than the Atoka Agreement gives the townsite commissioners.

In *Hagar v. Wikoff* there were various transfers as here, but we ignore them. Wikoff leased a lot in the town of Stillwater to Mrs. Hagar in 1889, and she and her husband continued in the occupancy of it during all the times involved. The townsite act was approved May 14, 1890. It will be noticed, therefore, that at the time the act was approved the tenant was in possession. She paid rent until July, 1890, at which time Mr. Hagar placed a tent on the lot and took up his residence in the tent and afterwards erected a building on the lot, and asserted claim to the lot by reason of his occupancy. It will be noticed that the facts of these two cases are practically

the same, and there as here, the tenant insisted on the strict letter of the statute while there, as here, the landlord appealed to those same fundamental principles of the law which enter into the interpretation of every statute. In that case Mr. Hagar tried to make some additional claim on account of the improvements and occupancy which he made, while Mrs. Hagar was the tenant, but this was denied by the court. At page 586 of the 2nd Oklahoma the court say:

“Having gone into possession of the lot under the contract to pay rent, and having actually acknowledged an interest in the property in favor of another by the payment of rent, he can not be heard to say that he occupied the lot for himself, unless he had openly and in good faith surrendered possession to the person from whom he obtained possession. His occupancy was the occupancy of the person from whom he procured possession. What improvements he made thereon in the absence of any agreement became the improvements of his landlord, and all the time he was occupying the lot his landlord was in actual occupancy through him, and the policy of the law, good conscience and morals will not permit him to say that it was his occupancy. If he desired to assert a claim to the lot before the townsite board, he should have in good faith vacated the lot, notified his landlord or the person who gave him permission to occupy and made his entry upon the lot as an adverse claimant.”

The same rule is stated in the 2d paragraph of the syllabus, which is as follows:

“A person who goes into possession of a town lot upon public lands as a tenant of one who has improved the lot by erecting a building thereon, will not be heard to assert a claim adverse to his landlord by reason of occupancy, settlement or improvement until he shall have vacated the premises and surrendered possession to his landlord.”

*Downman v. Saunders*, 3 Okla. 227, construes this same townsite act and is also in direct conflict with the opinion last handed down in the case at bar. In this case (as seems to be usual in such cases) there were various transfers of interest. Again we do not take time to note them. The question arose between one who had been put out of possession by threats, force and intimidation and him who had secured the possession, erected improvements and held the actual occupancy at the time the townsite board scheduled the lot. There, as here, the townsite board awarded the lot to the actual occupant thereof and the owner of the improvements. The action was brought by the one entitled to the possession to have a trust declared. There, as here, a claim was made for a literal construction of the statute, but there the claim was denied, while here it has

been sustained. There the party was prevented from making valuable improvements by the hostile acts of the defendant, and there the actual merits of the case prevailed, while here they have not prevailed. At page 233 of the 3rd Oklahoma it is said by the court:

“Counsel for plaintiff in error contend that the judgment should be reversed because plaintiff below was not an actual occupant upon the lots on July 27, 1892, the date when the land was entered for townsite purposes, and because the improvements and possession of the plaintiff were not sufficient to constitute him an occupant of the lots for townsite purposes. It would be a queer rule of law that would permit plaintiffs in error to urge either of these objections to the plaintiff's right to the lots.”

At page 234 it is again said:

“The evidence also shows that Saunders had made arrangements for lumber to build on the lots, and went there on July 22nd for the purpose of making further improvements and that Tucker, with a hatchet in his hand, refused Saunders permission to go upon the lots, and threatened to split his head open if he went upon them or even through his own fence. Saunders is admitted to be a prior settler to Tucker. His rights to the lots attached long prior to those of Tucker and existed with Tucker's knowledge, and it does not lie in the mouth of a trespasser, a law-breaker, a ruffian and a bully, who keeps a settler off of government land, to claim that



he has a prior right to acquire title because of the insufficiency of his adversary's occupancy and improvement, when better improvements have been prevented by the unlawful force and violence of the very person who makes these objections against the right of the settler. It would not do to hold that one settler may eject another settler from his settlement, and take possession of his improvements, and prevent the first settler from making further improvements, and then succeed on account of the slight improvements of the first party."

The court then say on page 235:

"Such a holding as that would be placing a premium upon fraud, violence and intimidation, which we cannot consent to do. The bounty of the government in giving lands to occupants for townsite purposes at the date of entry was not intended to aid those who unlawfully and forcibly take possession of the very ground settled upon by another party."

The last quotation is supported by reference to *Rector v. Gibbon*, from which we have already quoted, and *Atherton v. Fowler*, 96 U. S. 513. We quote this last reference:

"As was said by Mr. Justice Miller, in the often cited case of *Atherton v. Fowler*, 96 U. S. 513: 'The generosity by which congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to set-

lements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicide, and other crimes of less moral turpitude.' "

In conclusion and in support of its holding that the law will prevail over might or artifice, the court say:

"There was no error, under the evidence, in finding that in equity Saunders was the actual occupant of the land at the date of the entry of the townsite, for it clearly shows that he was an occupant prior to the interruption by Tucker, and that he would have been an actual occupant and would have had ample improvements on the land to entitle him to a deed by virtue of his occupancy and improvements, except for the forcible resistance of Tucker and this resistance cannot permit Tucker to acquire and convey to another, who had notice of Saunder's claim, the title to property which, in equity and good conscience, belongs to Saunders."

3.

The tenant having acquired a deed in violation of the rights of his landlord holds the title as trustee for his landlord.

*Rector v. Gibbon*, 111 U. S. 276.

*Baldwin v. Clark*, 107 U. S. 463.

*Wallace v. Adams*, 143 Fed. 716.

*James v. Germania Iron Co.*, 107 Fed. 597.

*Trice v. Comstock*, 121 Fed. 620.

*Bertran v. Cook*, 32 Mich. 518.

**Reply to Motion to Dismiss**

Not much need be said on this subject. What we have already said is in vain if it has not been made to appear that the decision of this case from the start has turned absolutely on the construction of the Atoka Agreement. As the Atoka Agreement is an act of Congress or treaty of the United States and as the right asserted by the landlord is based on that agreement and as the decision of the Supreme Court of Oklahoma is adverse to that right a writ of error will lie.

It is claimed, however, that by moving to remand the case from the Federal court to the state court that we are now estopped from asserting that a Federal question exists. The order making

the remand appears at pages 318 and 319 of the record. In the order the court says:

“The court find(s) after examining all of said pleadings in said cause that neither the original petition, amended or supplemental petition of plaintiff shows necessarily any construction of the Act of Congress or any treaty or law of the United States involved in said cause.”

A case cannot be removed from the Federal court to the state court as one arising under the laws of the United States unless the plaintiff's own statement discloses this fact, and where plaintiff's statement does not, the omission cannot be supplied by the petition for removal or by any of the defendant's pleadings.

*Minnesota v. Northern Securities Co.*,  
194 U. S. 48.

As the tenant's pleadings did not disclose the Federal question the case was improperly removed to the Federal court, and therefore was properly remanded and therefore it necessarily follows that the landlord is not estopped.

What we have said in the main brief answers every other position taken in the motion to dismiss except that no Federal question is raised on the pleadings. The answer and cross-complaint of

the landlord appear at pages 56 to 65 of the printed record and from start to finish disclose the assertion of his right under the Atoka Agreement.

Even if that were not true, however, in *Miedrich v. Louenstein*, 232 U. S. 236, this court holds that

“A federal question which the highest state court regards as duly before it for consideration, and which it proceeds to determine, will be regarded by the Federal Supreme Court, on writ of error to the state court, as duly made.”

The first opinion of the Supreme Court, prepared by Commissioner Rosser (record, page 253), as well as the last opinion, prepared by Commissioner Brewer (record, page 279), disclose both in the syllabi and the bodies of the opinions, that the whole case turned on the proper construction of the Atoka Agreement, and therefore a Federal question was regarded by the state supreme court as presented and was expressly decided adverse to the landlord.

In *American Express Co. v. Maynard*, 177 U. S. 404 (20 Sup. Ct. Rep. 697), the rule as stated in the syllabus is as follows:

“A question as to the construction to be placed on the act of Congress of June 13,

1898, known as the war revenue act, with respect to the right of an express company to shift the burden of the stamp tax upon shippers, constitutes a Federal question for the purpose of a writ of error to a state court from the Supreme Court of the United States."

In *Nutt v. Knut*, 200 U. S. 12 (26 Sup. Ct. Rep.) 216, the first paragraph of the syllabus is as follows:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of U. S. Rev. Stat., Sec. 709, U. S. Comp. Statutes 1901, p. 575, providing for writs of error from the Supreme Court of the United States to the state courts, to assert a right and immunity under such statutes, although they may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

In *Wadkins v. Producers Oil Co.*, 227 U. S. 368 (33 Sup. Ct. Rep. 380), the first paragraph of the syllabus is as follows:

"The Federal Supreme Court had jurisdiction of a writ of error to a state court to review a decision in a suit which both plaintiff and defendant assert rights under a homestead entry, and the Federal question was passed upon by the state court and made an element in its decision."

In *Gauthier v. Morrison*, 232 U. S. 452 (34

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*In the*  
**Supreme Court of the United States**

H. B. Johnson et al.,  
*Plaintiffs in Error,*  
vs.

E. E. Riddle,  
*Defendant in Error.*

No. 4 161.

**Motion to Dismiss Writ of Error or Affirm  
Judgment of the Court Below for Want  
of Sufficient Federal Question.**

C. B. STUART,  
A. C. CRUCH,  
W. A. LADRETT,

*Attorneys for Defendant in Error.*

Oklahoma Law Brief Company, 139 W. Third St., Oklahoma City



Sup. Ct. Rep. 384) the first paragraph of the syllabus is as follows:

“A decree of the highest state court adverse to the asserted rights under the Federal homestead law to settle upon unsurveyed public land, notwithstanding the wrongful act or error of the surveyor in designating and meandering such land as a lake, and to remain in possession to the end that the acts essential to the acquisition of title may be performed, is reviewable under the Federal Judicial Code, Par. 237, by the Federal Supreme Court.”

In *A. T. & S. F. R. R. Co. v. Robinson*, 233 U. S. 173 (34 Sup. Ct. Rep. 556) the first paragraph of the syllabus is as follows:

“A decree of a state court denying to the defendant the benefit of a Federal statute, compliance with which was set up in the answer and supported by testimony tending to show the truth of the allegation thereof, is an adverse ruling on the Federal right which, under the Judicial Code, Par. 237 (36 Stat. at L. 1156, Chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227) warrants bringing the case up to the Federal Supreme Court by writ of error.”

Section 237 of the Judicial Code confers upon this court the right to review the decision of a state court.

“\* \* \* Where any title, right, privilege, or immunity is claimed under the Constitution, or any statute or treaty of, or Commis-

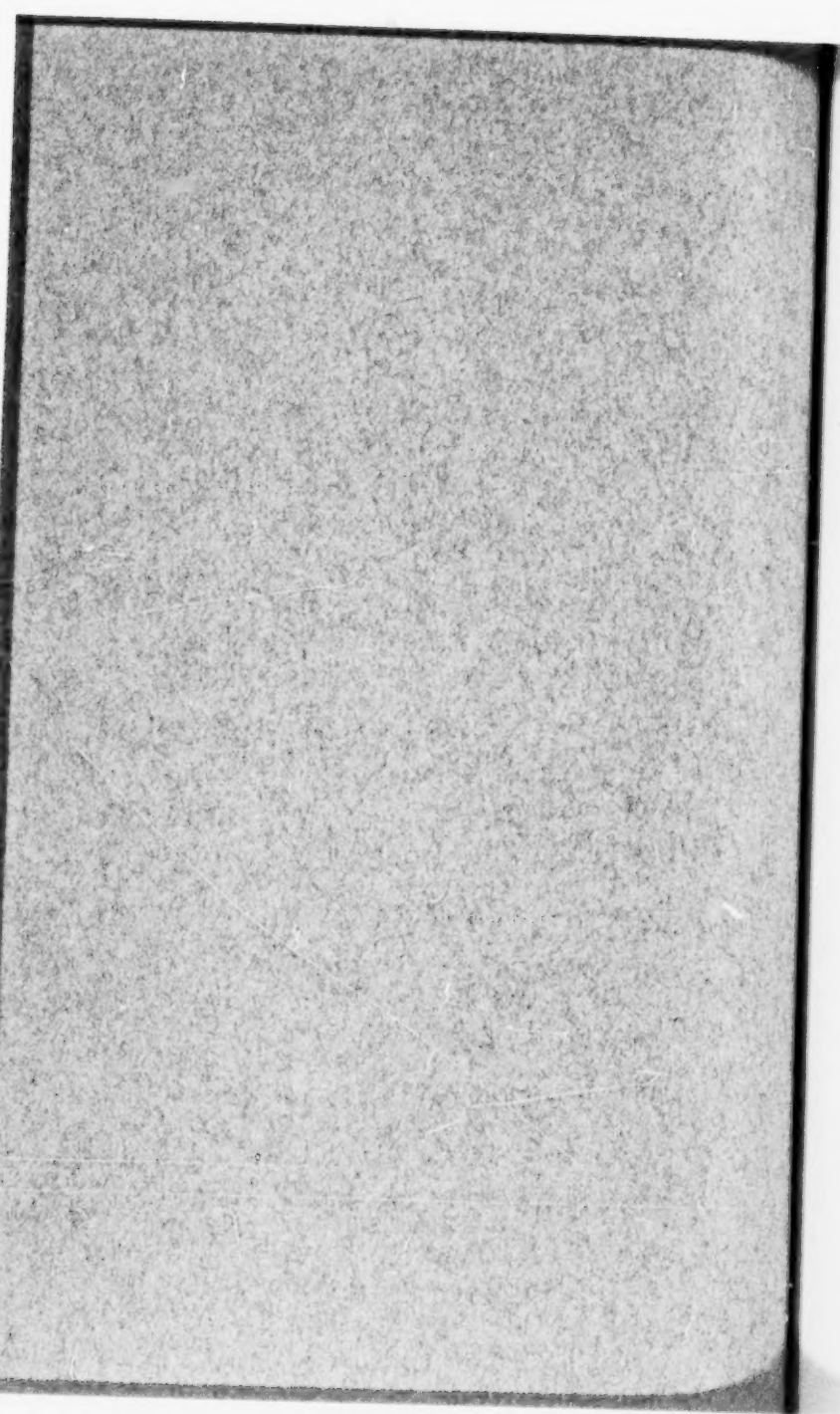
sion held or authority exercised under the U. S., and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party \* \* \*

The foundation of our claim in this case is that under the Atoka Agreement we have a right to declare the tenant as a trustee of the title for us, while his entire claim is that under the Atoka Agreement he was given the right to repudiate his contract with us, to repudiate the relation of landlord and tenant, to hold possession wrongfully and hostile to us and thereby acquire title independent of us.

We respectfully submit that the case comes squarely within the statute and the decisions cited.

C. B. AMES,  
ALGER MELTON,  
*Attorneys for Plaintiffs in Error.*

AMES, CHAMBERS, LOWE & RICHARDSON,  
BOND, MELTON & MELTON,  
*Of Counsel.*



*In the*  
**Supreme Court of the United States**

---

H. B. Johnson *et al.*,

*Plaintiffs in Error,*

vs.

F. E. Riddle,

*Defendant in Error.*

No.

---

**Motion to Dismiss Writ of Error or Affirm  
Judgment of the Court Below for Want  
of Sufficient Federal Question.**

---

Now comes the defendant in error, F. E. Riddle, and moves the court to dismiss the writ of error herein, or affirm the judgment of the court below, for want of sufficient federal question for the following reasons, to-wit:

**First.**

That the plaintiffs in error are estopped to claim that a federal question is involved in this action within the jurisdiction of this court, for the reason

that when this action was pending in the District Court of Grady County, in the State of Oklahoma, and long after they had filed their answer and cross petition, (Transcript, pages 56-93), they filed a petition in said court for the transfer of the cause to the United States Circuit Court for the Eastern District of Oklahoma (Transcript, pages 317-318). Said petition being accompanied by a good and sufficient bond and verified by affidavit as required by law, was granted, and the cause was transferred to said United State Circuit Court. The petition was filed on March 28, 1908, and on November 30, 1908, plaintiffs in error changed their minds, and took the position that there was no federal question in the case such as would justify the removal of the same to the United States Circuit Court, or the retention of the case in said court, and on said day induced the United State Circuit Court for the Eastern District of Oklahoma to make the following order, remanding said cause to the state court, to-wit (Transcript, pages 318-319):

"Now on this, the 30th day of November, 1908, came on to be heard at Chickasha, in open court, the motion and petition of the defendants herein to have the above entitled cause referred and transferred to the state court, and the court being well and sufficiently advised in the premises is of the opinion that said motion is well taken and should be granted, for the following reasons:

"The Court find after examining all of said pleadings in said cause that neither the original petition, amended or supplemental petition of plaintiff shows necessarily any construction of the act of Congress or any treaty or law of the United States involved in said cause, and that it appearing to the court from said pleadings that the main question involved in said cause at the

time the same was scheduled to the plaintiff in said cause, and that under the Act of Congress the only question was as to the ownership of said improvements the owner thereof being entitled to purchase said lot.

"It is therefore considered, ordered and adjudged by the court that said cause be and the same is hereby retransferred to the state court of the State of Oklahoma.

"Done in open court at Chickasha, this 30th day of November, 1908.

RALPH E. CAMPBELL,

"Judge U. S. Circuit Court  
Eastern District of Oklahoma."

#### ARGUMENT.

The plaintiffs in error are clearly estopped from claiming that the federal courts have jurisdiction to determine any question involved in the writ of error by their action in filing their motion in the United States Circuit Court for the Eastern District of Oklahoma to remand the case to the state court, and inducing the United States Circuit Court to hold that "after examining all the pleadings in the case" \* \* \* they do not show, "necessarily, any Act of Congress or any treaty or law of the United States, and that it appearing to the court from such pleadings that the main question involved in said cause, under the Act of Congress, is as to the ownership of improvements situated upon the lot in question involved in said cause at the

time the same was scheduled to the plaintiff in said cause; and that under the Act of Congress the only question was as to the ownership of said improvements, the owner thereof being entitled to purchase the lot." (Trans., page 319.)

This order was made on the 30th day of November, 1908, while the answer and cross petition was filed in the old United States Court for the Southern Indian Territory, on August 20, 1907. (The answer and cross petition were before the United States Circuit Court when the order remanding the case was made.)

The plaintiffs in error thus elected to treat this case as one not involving a federal question, but as depending on the question of fact as to the ownership of the improvements, to be determined under the local law.

The United States Circuit Court rightfully held that on the face of the pleadings it did not appear that any construction of an Act of Congress, or treaty or law of the United States was involved in the case, but that it did appear that the main question involved was as to the ownership of the improvements on the lot in controversy, and that the only question so far as plaintiffs

in error were concerned was as to the ownership of the improvements.

Plaintiffs in error denied the jurisdiction of the United States Circuit Court, upon the ground that the cause did not necessarily involve a construction of any Act of Congress, or treaty or law of the United States, and that the main question involved in the cause was as to the ownership of the improvements. Having elected to deny the federal jurisdiction on this ground, and the ground being well taken, as shown by the pleadings in the case as well as by the decision of the Supreme Court of the State of Oklahoma, and after having induced the Federal Court to refuse to entertain jurisdiction on the grounds enumerated, and caused the case to be remanded to the State Court, and there prosecuted to final judgment and on appeal to the Supreme Court of the State, and having lost on all their contentions, in both the trial court and the Supreme Court, it is too late now for plaintiff in error to shift their position and invoke federal jurisdiction. They elected their remedy when they induced the Federal Court to deny jurisdiction and to render judgment based on a finding that there was no federal question in the case. This judgment adjudicates the question of jurisdiction in



favor of the contention which plaintiffs in error then made in that court. It was a proper adjudication on the question of jurisdiction and is just as binding on the plaintiffs in error as any other adjudication of a court of competent jurisdiction. We submit that they ought not now to be permitted to take the opposite position and maintain their writ of error upon the ground that the case does involve a federal question. The prosecution, by them, of the writ of error from this court is inconsistent with their action in inducing the United States Circuit Court to hold that the case did not involve a federal question. It is equivalent to the assertion by them, as appears from the record in the case, that although while the case was pending in the United States Circuit Court they had the right to induce that court to hold that the case involved no federal question, they may now induce this court to take the contrary view and determine a federal question, which, at their instance, was solemnly adjudicated not to exist.

The rule with reference to taking inconsistent positions and the election of remedies is too familiar to require the citation of much authority, but we invite the court's attention to Volume 15, page 259, of *Cyc.*, where it is said that any

decisive act of a party with knowledge of his rights and of the facts, determines his election in face of conflicting and inconsistent remedies, and that the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against him, is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.

And again, at page 262, in speaking of the effect of election of remedies, the same author says:

"An election once made, with knowledge of the facts, between co-existing remedial rights, which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon remedial right inconsistent with that asserted by the election, or to the maintenance of the defense founded upon such inconsistent right."

Plaintiffs in error denied the existence of a federal question in the case, and induced the United States Circuit Court to so hold. The election thus made constitutes a bar to their present contention that the case involves a federal question.

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## Second.

This court is without jurisdiction to entertain the writ of error herein, because the decision of the case in the Supreme Court of the State of Oklahoma, in favor of the defendant in error, was not against any "title, right, privilege, or immunity claimed" by plaintiffs in error, under the "constitution, treaties, statutes, laws, commissions, or authority of the United States." But the decision of the Supreme Court of the State of Oklahoma was in favor of defendants in error and sustained his title because he was the owner of improvements upon the lot in controversy, and therefore entitled to purchase it under the laws of the United States and treaty with the Chickasaw and Choctaw Tribes of Indians, governing the sale of town lots belonging to said tribes of Indians, wherein it is provided that the town lots shall be laid out and appraised, and that "the owner of improvements on each lot shall have the right to buy one residence and one business lot at fifty percentum of the appraised value of such property."

## A R G U M E N T.

An inspection of the record discloses the fact that the decision in the Supreme Court of the State of Oklahoma, in favor of the defendant in error, was not against any title, right, privilege, or immunity claimed by the plaintiffs in error under the constitution, treaty, statutes, laws, commission, or authority of the United States. It was necessary for the courts to construe the Chickasaw and

Choctaw treaty, relating to the disposition of lots in townsites, in order to determine the title set up by defendant in error in this action, it being an ejectment suit and his title being denied by the plaintiffs in error. And it was claimed by them that the defendant in error had no right to purchase the lot under the provisions of the treaty, for the reason that defendant in error was not the owner of the improvements on the lot.

The treaty, after providing for the appointment of a Townsite Commission, the laying out and platting of townsites, and the appraisement of lots on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses were found, provided:

"The owner of the improvements on each lot shall have the right to buy one residence lot and one business lot at fifty percentum of the appraised value of such improved property, and the remainder of such improved lots at sixty-two and one-half percentum of said market value, within sixty days from the date of notice served on him that such lot is for sale, and if he purchase the lot, he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price and the balance in three equal annual installments, and when the entire sum is paid, shall be entitled to a patent for the same." (Act of Congress, June 28, 1898, 30 Stat. L. 495.)

The record discloses much controversy in the Land Department and in the Courts over the ownership of improvements on the lot, but the United States Indian Inspector, the Commissioner of Indian Affairs, the trial court and the Supreme Court all held that defendant in error was the owner of the improvements on the lot and therefore entitled to purchase the same; and the patent from the Chickasaw and Choctaw Tribes vested title in him, but the construction of the treaty quoted, in order to determine the title of the defendant in error, does not present a federal question upon which the plaintiffs in error may rely in this case. The decision of the Supreme Court was in favor of the title asserted by defendant in error, and thus involved no federal question within the meaning of section 237 of the present judicial code, which was approved March 3, 1911, wherein, among other things, it is provided:

“A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had \* \* \* where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, *and the decision is against* the title, right, privilege or immunity especially set up or

claimed, \* \* \* may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The decision of the Supreme Court, as just stated, being in favor of the title asserted by defendant in error, the construction of the treaty which was necessary to ascertain whether or not defendant in error had title, does not present a federal question which would be available to the plaintiffs in error in this court. This rule is well established by the decisions of this court.

In the case of *DeLamars' Nevada Gold Mining Company v. James Nesbitt*, 177 U. S. 523, L. Ed. Vol. 44, page 872, the plaintiff claimed title to a certain mining claim covering the same ground as that of one Davidson, the defendant. The action being to quiet plaintiff's title, the plaintiff alleged the facts showing his compliance with the laws of the United States and charging that the defendant also claimed the ground, by virtue of the location of a certain claim, called by him the "Sleeper Claim," but that such location was subsequent to the location of the plaintiff; and that the plaintiff had protested in the land office against the issuance of a patent to the defendant, and in an answer denied the ownership and possession of plaintiff, and alleged as a defense the invalidity

of plaintiff's claim, under which he acquired title. Trial was had in the state court, which resulted in a judgment in favor of the plaintiff, from which judgment an appeal was taken to the Supreme Court of the State of Nevada, where the judgment was affirmed, and a writ of error was procured from this court and this court dismissed the writ of error for want of jurisdiction. After stating somewhat in detail the history of the controversy, the court said:

"From this summary of the proceedings and the findings of the court, it is clear that the defendant set up no right, title, privilege, or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made by Davidson, under the general mining laws of the United States (Rev. Stat. Sec. 2325), was not in itself sufficient to raise a federal question, since no dispute arose as to the legality of said location, except so far as it covered grounds previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court, something more must appear than that the parties claimed title under an Act of Congress. \* \* \* There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount

of work. The decision of the court, however, was in favor of and not against the right claimed under this statute; and of this construction, the plaintiff in error is in no position to take advantage, as it made no claim under this statute."

See also:

*Lowry v. Silver City Gold & Silver Mining Co.*, 179 U. S. 198, 45 Law Ed. 152.

*Iowa v. Rood*, 187 N. S. 92, Law Ed. 47, p. 90.

### Third.

The plaintiffs in error in the court below did not base their claim to the lot in controversy on the constitution or laws of the United States, or treaty with the Chickasaw and Choctaw tribes of Indians, independent of their ownership of improvements upon the lot; and the decision of the Supreme Court of the State of Oklahoma is based upon the determination of the question of fact, wherein it is held that they were never the owners of any improvements on the lot in controversy entitling them to purchase said lot. And this court is without jurisdiction to entertain the writ of error, for the reason that the determination of this question of fact against the plaintiffs in error did not involve the application or construction of the constitution or the laws or treaties of the United States, but merely involved the application of the local law in the consideration of the evidence offered on the issue as to whether or not the plaintiffs in error or the defendant in error owned the improvements upon the lot entitling the one or the other to purchase it under the provisions of the treaty.



# ARGUMENT.

This being an ejectment suit, it was necessary for the defendant to recover on the strength of his own title, his title being disputed by the plaintiffs in error, upon the ground that defendant in error was not entitled to purchase the lot in controversy, because defendant in error did not own improvements on the lot, entitling him to purchase under the provisions of the Chickasaw and Choctaw Treaty.

The title of the defendant in error was sustained by the finding of the United States Indian Inspector, who heard the contest on behalf of the United States Land Department, that on the date the townsite of Chickasha was laid out by the Townsite Commission for the Chickasaw Nation and on the date the plats thereof were approved by the Secretary of the Interior, J. P. Ellis, was the owner of permanent, substantial and valuable improvements thereon, other than fences, tillage and temporary houses; and that Ellis sold and conveyed his improvements upon the lot to Riddle, defendant in error; and that Riddle presented the conveyance of the improvements to the Commission; and that the lot was duly scheduled to Riddle and Cooke, the latter afterwards transferring his interest to Riddle. (Trans. p. 79.)

This finding of facts was approved by the Secretary of the Interior. (Trans. pp. 86-87.) And also by the opinion of the Assistant Attorney General for the Interior Department. (Trans. pp. 877-93.) Also by the judge of the trial court in his findings of fact, wherein in approving the decision of the Land Department on the question of fact as to who owned the improvements, the trial judge said (Trans. pp. 235-238) :

"And first as to the ownership of the improvements, we believe the evidence taken in connection with the pleadings in the unlawful detainer suit, which was considered in evidence, put the question of ownership beyond the boundaries of dispute."

The finding of fact that Riddle was the owner of the improvements is further sustained and approved by the decision of the Supreme Court of Oklahoma, wherein it is said:

"Who of the claimants owns the improvements? That the improvements on this lot met the requirement of the law is beyond dispute. Then, if the townsite commission, upon its investigation, found, as we assert, that Riddle owned the improvements and that the Johnsons owned no improvements, how can it be successfully affirmed that in awarding the lot to Riddle it fell into error of law?"

As stated above, the action was an ejectment, but the plaintiffs in error filed a cross petition,

charging that they were the owners of the improvements upon the lot, and therefore entitled to purchase it, under the provisions of the Treaty. The lot having been patented to Riddle in pursuance to the decision of the Land Department, plaintiffs in error, in their cross petition, prayed that he be held to hold the title in trust for them. The record conclusively shows that Riddle was the owner of the improvements and entitled to purchase the lot. The only claim which plaintiffs in error asserted was that they owned the improvements upon the lot, and not Riddle, and that therefore they were entitled to the lot, which had been, by the action of the land department, erroneously patented to Riddle. We invite careful consideration of the cross petition of plaintiffs in error, H. B. and E. B. Johnson, beginning at page 57 and ending, so far as its allegations are concerned, at page 65 of the record, but the exhibits thereto attached extend to page 93 of the Transcript. The allegations of this cross petition are extremely *prolix*, relating to many matters alleged to have taken place before the adoption of the Chickasaw and Choctaw Treaty, on June 28, 1838. (30 Stat. L. 495.) But all of the allegations contained in this cross complaint are designed to show that the plaintiffs in error, or their predecessors, in

a line of conveyances, owned the improvements on the lot; and from this showing they contended that the decision of the land department in awarding and causing the lot to be patented to Riddle was erroneous; and in the trial court and Supreme Court of the State of Oklahoma plaintiffs in error endeavored to have the error which they claimed was thus committed corrected, upon the ground that the evidence showed that they were the owners of the improvements. As shown by the decision of the Supreme Court (Trans. 280-289), it was conceded that the finding of fact by the land department against the plaintiffs in error was binding upon them, but they contended that by reason of the proceedings in the unlawful detainer suit, mentioned in their cross petition, and the tenancy of Ellis, Riddle's predecessor, in a line of conveyances under Fitzpatrick, the predecessor of Johnsons in a line of conveyances, the improvements on the lot had become forfeited to Fitzpatrick, and that this forfeiture, in some indirect and mysterious way, inured to the benefit of the Johnsons. The gravamen of the claim of plaintiffs in error was that they were the owners of the improvements on the lot and therefore entitled to purchase it, and having

been deprived of this right by the decision of the land department they were entitled by the decree of the court to have Riddle held as trustee for them. But the decision was against them on that issue. We submit, however, that the decision of the Supreme Court on that issue against the plaintiff in error does not raise a federal question and that therefore the motion to dismiss the writ of error should be sustained.

The case of *Telluride Power Transmission Company v. Rio Grande Western Railway Company*, 175 U. S. 639, 44 L. Ed. 305, is in point. It was an action brought in the State District Court of Utah by the railway company against the Transmission Company to confirm and quiet title of the plaintiff to certain unsurveyed public lands of the United States in the State of Utah. The plaintiff in the court below alleged compliance with the laws of Congress, under which it claimed to have acquired title to the land; and that while the plaintiff was lawfully in possession of the land the defendant set up an adverse claim and by threats and force stopped its work and denied its right to use the land for railroad purposes. The defendant, the Transmission Company, in its answer denied the material allegations of the complaint, and alleged that it had taken posses-

sion, and alleged compliance with certain Acts of Congress, which authorized it to acquire title to the premises; and that defendant had been in possession of the land more than two years before the suit was brought. The plaintiff's title was sustained in the trial court and the Supreme Court of Utah affirmed the judgment. The defendant sued out a writ of error to the Supreme Court assigning, among other things, the failure of the District Court to remove the case to the Circuit Court of the United States. Mr. Justice Brown, speaking for this court, denying jurisdiction, said:

"We think the case falls more properly within the third clause as one wherein a title or right is claimed under a statute of the United States. In such case such title or right must be 'specially set up and claimed' before judgment in the state court. In its complaint, the plaintiff railway company makes no allusion to this act, but relies upon an act of Congress respecting a right of way for railroads through public lands of the United States (18 Stat. L. 482, Chap. 152), and upon certain provisions of the local laws of Utah. The statute is not set up in the answer of the defendants, who relied upon their priority of possession. So, also, in the thirty-three assignments of error filed by the defendants in the state Supreme Court no reference is made to an Act of Congress as the basis of their right, and no intimation is made that the District Court erred in the construction or application of any such act.

"In the opinion of the Supreme Court it is stated that the errors alleged raised the questions, first, whether there was not a statutory forfeiture of the plaintiff's charter in consequence of a failure to complete and put its road in operation; second, whether plaintiff had the lawful right to locate its right of way in the canon, and had located it over the land in dispute, and was in actual possession thereof, when defendant interfered; third, whether the law required the plaintiff to file with the register of the land office a profile of its route; and fourth, whether the defendants made such appropriation, or had such possession of the land in dispute as authorized them to hold it against the plaintiff. After discussing the validity of the plaintiff's charter, the powers granted by it and the possession of the plaintiff, the opinion proceeds to consider whether the defendants had any right to the land in dispute, and in this connection finds that they might have obtained a vested right to own unappropriated waters of the Provo river for the purposes specified in their charter, and that such right is recognized and acknowledged by Rev. Stat., paragraph 2339, above cited, but professed itself unable to find from a preponderance of the evidence in the record that the defendants, or either of them, had appropriated the land in dispute, and that they were, or that either of them was, in actual possession of it when the plaintiff located its right of way, took actual possession and engaged in grading it. We cannot regard the plaintiff as a mere intruder on the defendant's possession nor can we hold that they had a right to prevent the plaintiff's employees from grading it and to eject plaintiff from actual possession of the land in dispute. \* \* \*

"From this *resumé* of the proceedings, it is evident that there was no denial to the defendants of any right they may have possessed by virtue of a priority of possession. The statute (Rev. Stat., paragraph 2339), provides that 'whenever, by priority of possession rights to the use of water' for certain purposes 'have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions,' the owners of such vested rights 'shall be maintained and protected in the same,' and their right of way for the construction of ditches and canals acknowledged and confirmed. But in order to establish any rights under the statute it was incumbent upon the defendants to prove *their priority of possession*, or at least to disprove *priority* on the part of the plaintiff. *The question, who had acquired the priority of possession? was not a federal question, but a pure question of fact upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was, whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendant's right to the use of the water was recognized and acknowledged by the local customs, laws and decisions, all of which were questions of state law.*

"In this contention an attempt is made to distinguish between the findings of fact and the conclusions of law. Defendants concede that they are bound by the findings of fact upon the subject of possession, but that they are not bound by the conclusions of law, which



are as follows: First, that the plaintiff, prior to the commencement of the suit, had the possession, right of possession, and the inchoate title of the lands described; second, that the defendant company had no power in Utah to engage in generating electric power for sale; third, that defendants never had the title, possession, or right of possession, to the lands, or acquired any vested right in accordance with the laws or customs of the country, or any right to flow or otherwise occupy said lands, or prevent the use and occupation thereof by the plaintiff railroad company and that their adverse claim was unfounded; fourth, that the plaintiff was entitled to judgment.

"It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a federal question. In this particular the case is covered by *Eilers v. Boatman*, 111 U. S. 356, 28 L. Ed. 454, 4 Sup. Ct. Rep. 432, which was an action for the settlement of adverse claims to mineral lands. The case turned upon the priority of location, which the court held was a matter of fact, although the court below called it a conclusion of law.

"The case under consideration in its material aspects resembles that of *Bushnell v. Crooke Mining & Smelting Co.*, 148 U. S. 682, 37 L. Ed. 610, 13 Sup. Ct. Rep. 771, which was an action of ejectment growing out of conflicting and interfering locations of mining claims. As stated by Mr. Justice Jackson, 'the question presented on the trial of the controversy, under the pleadings was purely one of fact and

had reference to the true direction which the Monitor lode or vein took after encountering a fault, obstruction or interruption at a point south of the discovery shaft sunk thereon \* \* \*. After the decision had been rendered by the Supreme Court of the state a petition for rehearing was presented by the plaintiffs in error, which, for the first time, sought to present a question whether paragraph 2322 of the Revised Statute of the United States gave to the appellants 'the exclusive right of possession' and enjoyment of all other veins or lodes having their apexes within the Monitor's surface ground.' The court held it to be 'plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fail to disclose the presence of any Federal question.' In this connection Mr. Justice Jackson quotes the remark of the Chief Justice in *Cook County v. Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 653, 34 L. Ed. 1110, 11 Sup. Ct. Rep. 435: 'The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.' See also *Doc ex dem. Barbarie v. Mobile*, 9 How. 451, 13 L. Ed. 212.

'The position of the plaintiffs in error is that, as their whole case depended upon the rights asserted by them under paragraph 2339, and that as the courts decided adversely to the rights claimed by them, there was no necessity of a special reference to that statute

relying in this connection upon such cases as *Miller v. Nicholls*, 4 Wheat. 311, 4 L. Ed. 578; *Satterlee v. Matthewson*, 2 Peter 380, 410, 7 L. Ed. 458, 468, and others cited in *Columbia Water Power Company v. Columbia Electric Street R. Light & Power Co.*, 172 U. S. 475, 488, 43 L. Ed. 521, 526, 19 Sup. Ct. Rep. 247, in which we have held that, if it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States, and the question was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms specially set up and claimed in the record is not conclusive against a review of the question here. But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question."

The same rule is announced again by this court in *Telluride Power Transmission Company v. Rio Grande Western Railway Company*, 187 U. S. 569, 47 L. Ed. 307, where, according to the second paragraph of the syllabus, it is as follows:

"Findings of fact or questions of local law

upon which depends a party's right under U. S. Rev. Stat., paragraph 2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court."

Mr. Justice McKenna, speaking for the Court, in sustaining the motion to dismiss the writ of error to the Supreme Court of Utah, said:

"The defendant in error has moved to dismiss the case for want of jurisdiction in this court. The essential issues of fact were decided against the plaintiffs in error and the case therefore seems to be brought within the ruling in *Telluride Power Transmission Co. v. Rio Grande Western R. Co.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245. The corporations in this case were parties in that case, and so were Nunn and Holbrook. The same public interests were in opposition and the power company relied for rights in Provo canon on paragraph 2339 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1437), as the company does in this case, and the rulings on those interests and rights constituted the vital questions in that case as they do in this. It was pointed out that, 'in order to establish any rights under the statute, it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff.' And it was observed: 'The question who had acquired this priority of possession was not a federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no ques-

tion arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws, and decisions, all of which were questions of state law.

"After discussion it was also observed: 'But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local, and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question.' "

Within the rule established by these authorities, the ownership of the improvements on the lot was the preliminary and controlling question to be determined and the decision of this question necessarily depended upon the local law.

In the case of *Udell v. Davidson*, 7 How. 769, it was held:

"What amounts to a trust or out of what facts a trust may spring, are not federal questions and not reviewable on a writ of error by this court."

See also *Smith v. Adsit*, 23 Wall. 368.

Under another view of the case the writ of error should be dismissed, and that is, that although there may be a federal question involved, still, if the decision was upon another ground, sufficient to dispose of the case, the Supreme Court is without jurisdiction. This point was decided in the case of *Lowry v. Silver City Gold and Silver Mining Company*, 179 U. S. 196, 45 L. Ed. 151, where it was held that a writ of error to review a decision in favor of the lessor of a mining claim against the lessees, who have attempted to make a new location, will be dismissed by the Supreme Court of the United States, when one of the grounds of the decision sufficient to dispose of the case is that the lessees are estopped to contest the right of the lessor. This court in that case said:

"The Supreme Court of the state placed its decisions upon two grounds: First, that, although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110, was held not applicable. The other ground was estoppel by virtue of the lease

under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis v. Bowles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131. See also *DeLamar's Nevada Gold Mining Co. v. Nesbitt*, 177 U. S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715, and cases cited in the opinion. The writ of error is dismissed."

The same rule was announced in the case of *Eustis v. Bowles*, 150 U. S. 361, 37 L. Ed. 1111, where according to the second paragraph of the syllabus it was held:

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has also been raised and decided against such party and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

In the body of the opinion it was held:

"It is settled law that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided ad-

versely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock v. Memphis*, 87 U. S. 20 Wall. 590 (22:429); *Cook County v. Calumet & C. Canal & D. Co.*, 138 U. S. 635 (34:1110).

"It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question to sustain the judgment, this court will not review the judgment.

"In *Klinger v. Missouri*, 80 U. S. 13 Wall. 257, 263 (20:635, 637), this court, through Mr. Justice Bradley, said: 'The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one,



sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction.'

"In *Johnson v. Risk*, 137 U. S. 300, 307 (34:683, 686), the record showed that in the Supreme Court of Tennessee two grounds of defense had been urged, one of which involved the construction of the provisions of the federal Bankrupt Act of March 2, 1867, and the other the bar of the statute of limitations of the State of Tennessee; and this court held that 'where, an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.'"

In the case of the *Seaboard Air Line Railway Company v. Durall*, 225 U. S. 477, 56 L. Ed. 1171, according to the second paragraph of the syllabus it was held:

"To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that

there was set up and denied a right, privilege, or immunity claimed under a federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act so directly involved that the state court could not have given the judgment it did without deciding against the contention of the plaintiff in error."

It cannot be said that the decision of the State Supreme Court depended upon a controlling federal question. On the contrary, the decision of that court is based upon a controlling local question of law and fact, and that is the ownership of the improvements on the lot sued for.

#### **Fourth.**

If, upon an examination of the records, the court should determine that the writ of error ought not to be dismissed, then we insist that under Section 5 of Rule 6, the judgment of the Supreme Court of the State of Oklahoma should be affirmed, because "the question on which the jurisdiction of the court depends is so frivolous as not to need further argument."

#### **A R G U M E N T.**

The Chickasaw and Choctaw Treaty or Act of Congress of June 28, 1898 (30 Stat. L. 495), among other things provides:

"When said towns are so laid out, each lot on which permanent, substantial and valuable improvements other than fences, tillage, and

temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same."

Neither defendant in error nor plaintiff's in error had any rights whatever in the lot prior to the adoption of this treaty; they were both trespassers on the public domain of the Indians. The only rights either of them had were conferred by the treaty, and the right to purchase the lot was conferred on the owner of the improvements. When the lot was scheduled to Riddle, by virtue of his ownership of the improvements, for the first time he had a legal interest in the lot. The controlling circumstances which conferred legal status on his possession of the lot was the fact that he

owned the improvements. The plaintiffs in error not being the owners of the improvements, were never in position to assert any right whatever under the treaty; they had no right which could be denied them by the decision of the Supreme Court of Oklahoma. (See opinion of Oklahoma Supreme Court, Trans. pages 284-289.) Hence we submit that the claim on the part of plaintiffs in error that a federal question is presented is utterly untenable and frivolous.

Respectfully submitted,

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In the Supreme Court of the  
United States

October Term, 1914

H. B. Johnson et al.,  
*Plaintiffs in Error,*  
vs.

E. E. Riddle,  
*Defendant in Error.*

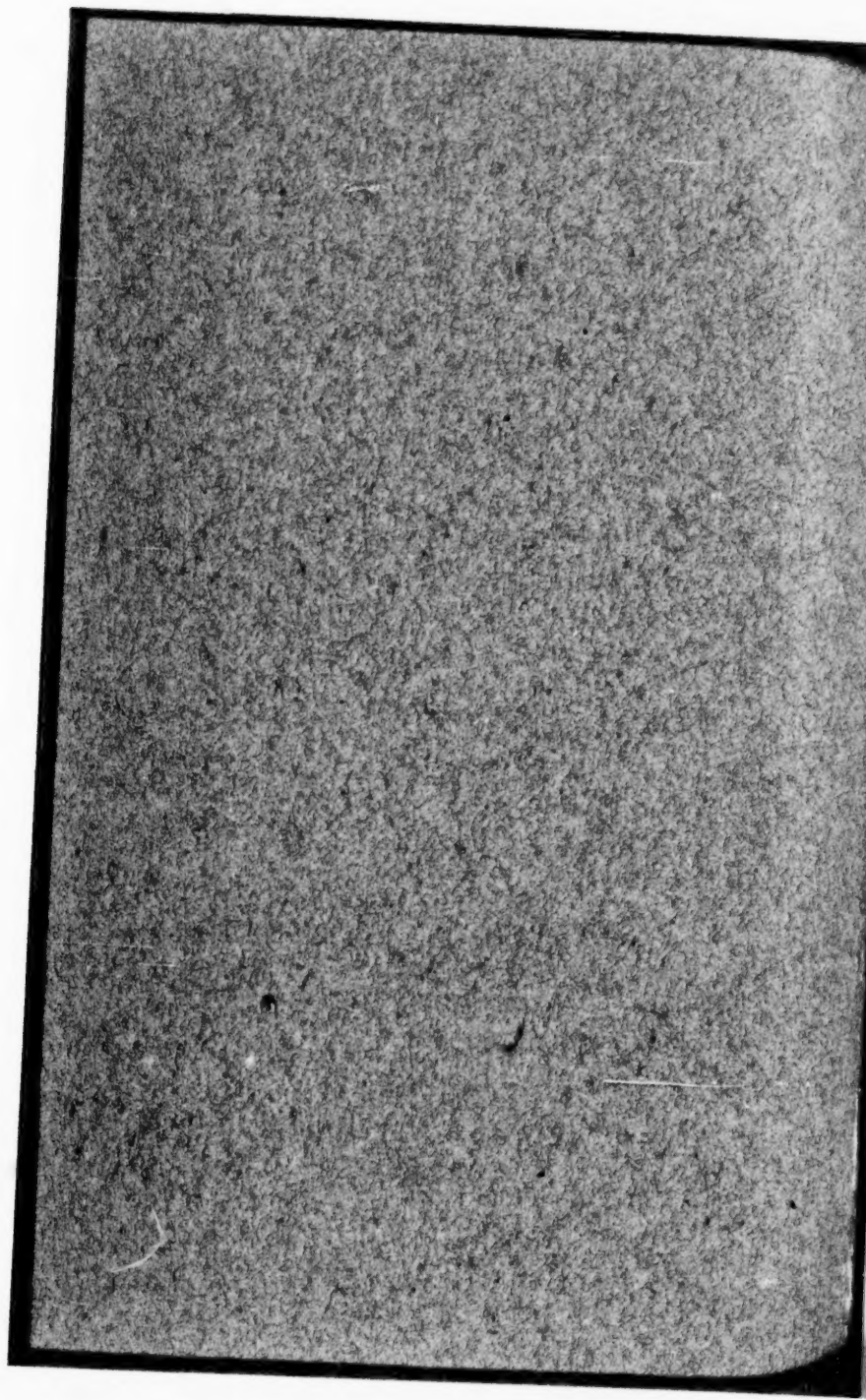
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Reply Brief for the Defendant in Error in  
Support of His Motion to Dismiss the Writ  
of Error, and also Brief for Defendant  
in Error on the Merits of the Case.

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# In the Supreme Court of the United States

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**October Term, 1914**

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E. B. Johnson et al.,

*Plaintiffs in Error,*

vs.

F. E. Riddle,

*Defendant in Error.*

**No. 498**

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**Reply Brief for the Defendant in Error in  
Support of His Motion to Dismiss the Writ  
of Error, and also Brief for Defendant  
in Error on the Merits of the Case.**

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The brief filed on behalf of plaintiffs in error evinces the hope that the Court may overlook the question of jurisdiction, and determine the case on its merits. We submit that the better practice

would be to inquire into the jurisdiction first, and if the Court finds it has no jurisdiction the writ of error should be dismissed.

We have examined the cases cited by counsel for plaintiffs in error in the latter part of their brief, in which they undertake to reply to our motion to dismiss, and confidently assert that the controlling proposition in our motion to dismiss is not disturbed by the cases cited by them.

It is apparent from the decision of the Supreme Court of the State of Oklahoma that both parties contended that the owner of the improvements on the lot in controversy had the preference right to purchase it under the provisions of the treaty, and the court sustained that contention. It is held in accordance with the plain language of the treaty, that the owner of the improvements on the lot had the right to purchase it. The defendant in error, being the plaintiff in the court below, asserted title under the patent, and based his right to the patent on the fact that he was the owner of the improvements on the lot. His title was disputed. It was incumbent on him to recover on the strength of his own title. In order to determine whether or not defendant in error, plaintiff in the court below, had title to the lot,

the Supreme Court of the state examined the treaty, and held that the plaintiff was the owner of the lot because of his patent, and his ownership of the improvements on the lot. To that extent, and to that extent only, the Supreme Court construed the treaty, and it sustained the contention of both plaintiff and defendants in the court below in their construction of the treaty; that is, that the owner of the improvements had the preference right to purchase the lot.

In passing on the contention in the cross complaint of plaintiffs in error in the court below, in which they claimed that they were entitled to purchase the lot because they were the owners of the improvements, a preliminary and controlling question arose, which was decided against them. It cannot be said that any title, right, privilege, or immunity claimed by plaintiffs in error under any treaty or statute of the United States was denied on the ground that the decision of the court is against the title, or right, so claimed, because the record discloses the fact that plaintiffs in error were not in position to assert any such right or title under the statute or treaty. So far as the construction of the statute is concerned, their contention was sustained, but the state

courts and the department of the interior held against the plaintiffs in error on the ground that they were never the owners of the improvements on the lot, and therefore had no right to purchase the lot. They were defeated by the decision of the interior department, the trial court and the Supreme Court, on the preliminary question as to the ownership of the improvements on the lot. It cannot be said that the treaty or statute conferred the ownership of the improvements on them, nor can it be said that the treaty or statute conferred on them the right to the possession of the lot, or the right to improve the lot. The only contention that they could make under the treaty or statute is that being the owner of the improvements on the lot they had the preference right to purchase it, but before that question could arise the preliminary question had to be disposed of, and the decision on this preliminary question before the interior department, the trial court and the Supreme Court was against plaintiffs in error.

The decision on this question depended upon the local law and upon a question of fact. Manifestly, under the well established rule in this Court, no Federal question can be predicated upon

the decision of the Supreme Court on this preliminary question of local law and fact. The case of the plaintiffs in error was disposed of before it reached a Federal question.

Counsel for plaintiffs in error are hardly fair in their quotation from the syllabus in the case of *Miedreich v. Lauenstein*, 232 U. S., page 236, where this Court said that a Federal question which the highest state court regards as duly before it for consideration, and which it proceeds to determine, will be regarded by the Federal Supreme Court on writ of error to the state court as duly made, because in that case the Court held that under the allegations of the complaint a Federal question was distinctly raised, and determined against the contention of the party who procured the writ of error. We find no difficulty with that case whatever. The decision of the State Supreme Court which was reviewed in that case showed conclusively that it considered and determined against the plaintiff in error his contention that the rights asserted by him were protected by the Fourteenth Amendment to the Constitution. This Court, therefore, properly held that the case involved a Federal question within its jurisdiction.

But we invite attention to the fact that the Supreme Court in that case refused to review a preliminary question to which the plaintiff in error called the attention of the Court, and held that it would not revise the findings of the highest state court upon the issue of whether service of process was fraudulently procured where evidence in support of the state court's decision on this point is conflicting.

Nor is the case of the *American Express Company v. Maynard*, 177 U. S. 402, an authority against our contention, because that case involved directly the construction of the Act of Congress known as the War Revenue Act, and the right asserted by the Express Company under that act was denied.

Nor is there anything in the case of *Wadkins v. Producers Oil Company*, 227 U. S. 368, which militates against our contention. In that case, as in the case at bar, both parties claimed the right under the laws of the United States, and the Court properly held that the Supreme Court had jurisdiction of a writ of error to a state court to review a decision in a suit in which both plaintiff and defendant asserted rights under homestead entry, and the Federal question was passed upon



by the state court and made an element in its decision, but in that case the decision of the state court upon the Federal question was against the right asserted by the plaintiff in error. No controlling preliminary question was involved or passed upon. Every element of the case and every fact which was considered by the state court related to the Federal question. The controlling question in the case was whether a homestead entry in the State of Louisiana, made under the laws of the United States, by the father of a minor is community property, her mother having died before the perfection of the entry. The Louisiana Supreme Court held it was not community property, and that the husband took the entire title, thereby denying the right claimed by the minor. The minor procured a writ of error from the Supreme Court of the United States to the State Supreme Court to review this decision. Every fact considered by the Supreme Court bore directly on the right thus asserted under the laws of the United States.

None of the other cases cited by opposing counsel in opposition to the motion to dismiss the writ of error involved a controlling preliminary question.

See also *Gillis v. Stinchfield*, 159 U. S. 658, *Carothers v. Mayer*, 164 U. S. 325. See also the case of *Wynne, Executor, v. Morris*, 20 Howard 5, where this Court says:

“Where complainant has no interest in land, but a naked possession, not protected by an Act of Congress, this Court has no jurisdiction to review a decision of the state court adverse to such title, no statute of the United States being drawn in question.”

We earnestly insist that plaintiffs in error by their act in filing the motion insisting in the Federal trial court that no Federal question was involved and inducing that court to remand the case to the State court on the ground and for the reason that no construction of a Federal statute of a Federal question involved, are now estopped from insisting in this court that such questions are involved.

It was said by Mr. Justice Brown, in the case of *Cowley v. Northern Pacific Railway Company*, 159 U. S., page 568, 40 Law Ed. page 263, quoting from page 267:

“The wise policy of the constitution gives him a choice of tribunals. The case having been removed to the Circuit Court upon petition of defendant it does not lie in its mouth to claim that such court had no jurisdiction

of the case, unless the court from which it was removed had no jurisdiction."

In the case of *Bushnell v. Kennedy*, 76 U. S., page 387, 19 Law Ed. page 736, Mr. Chief Justice Chase said:

"The first act of the defendant, indeed, under the twelfth section, is something more than consent, something more than waiver of objection to jurisdiction, it is prayer for the privilege of restoring to federal jurisdiction, and he cannot be permitted afterwards to question it."

The same principle will apply in the case at bar, the plaintiffs in error having alleged lack of a Federal question and caused the court to so adjudicate, it does not now lie in their mouth to assert in this court that there is a Federal question.

We therefore submit that the writ of error must be dismissed.

### REPLY TO BRIEF ON THE MERITS.

The right to purchase a lot was not conferred upon the landlord in preference to the tenant, neither was it conferred upon the possessory right or the person in rightful possession. The right was specifically conferred upon the person who was the legal owner of permanent, substantial and valuable improvements other than fences, tillage and temporary houses, irrespective of the fact as to the possession of the lot or the relation of landlord and tenants. A person out of possession, if he owned the improvements which would bring him within the terms of the agreement had the right to purchase as against both the landlord and the tenant.

The provision of the treaty, so far as affects this case, is as follows:

“It is further agreed that there shall be appointed a Commission for each of the two Nations. \* \* \* Each of said Commissions shall lay out townsites, etc. \* \* \* Said Commission shall have prepared correct and proper plats of each town and file one in the clerk’s office of the United States Court for the district in which the town is located, and one with the Principal Chief or Governor of the Nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out each

lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary houses have been made, shall be valued by the Commission provided for the Nation in which the town is located, at the price a fee simple title to the same would bring on the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of said improved property, and the remainder of said improved property at sixty-two and one-half per centum of said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall within ten days from his purchase pay into the Treasury of the United States one-fourth of the purchase price and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the Commission fail to agree as to the market value of any lot or the limit or extent of said town, one of said Commissioners may report such disagreement to the Judge of the District in which said town is located, who shall appoint a third member to act with said Commission, who is not interested in town lots, who shall act with them to determine said value. If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot with the improvements thereon shall be sold at public auction to the highest bidder, under the direction of the aforesaid Commission, and the purchaser at

such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of said appraised value of the lot, and shall pay the sixty-two and one-half per cent of said appraised value into the United States Treasury, etc. \* \* \* All lots not so appraised shall be sold from time to time at public auction, after proper advertisement, by the Commission for the Nation in which the town is located."

The cases relied on by the plaintiff, such as *Rector v. Gibbons*, reported in 111 U. S., page 206, involved provisions of an Act of Congress conferring the right to purchase upon the occupancy or upon the rightful possessor of the lot. Necessarily, in such cases the right would extend to the landlord in preference to the tenant, since the tenant's occupancy or his possession of the lot would be that of the landlord. This is not true, however, under the provision of the Atoka Agreement, *supra*.

It is provided in the treaty that unimproved lots should be appraised and sold at public sale.

It also provides how the owner of the improvements shall pay the appraised value, and provides that if such owner of the improvements fails to pay the appraised value, the lot on which he owns improvements shall be sold in the manner

provided for the sale of unimproved lots. Provision is also made for the condemnation and appraisal of improvements on lots, purchased at public sale, where the owner of the improvements fails to purchase the lots. In the plainest terms possible the treaty recognizes the ownership of the improvements on the lot as the sole test of the right to purchase. The right to purchase the lots is not conferred on the lessor, or the person entitled to the possession of the lot under any contract or lease. It is given solely to the owner of the improvements.

The provision of the treaty, quoted above, was framed and adopted with reference to the known conditions then prevailing in the Chickasaw and Choctaw Nations. It was known that most of the townsites were settled and most of the houses built thereon under lease contracts executed by members of the tribes and white persons. The towns were built as a result of the enterprise, in great measure, of white persons who had settled in the Indian Territory, who were willing to risk the investments made by them in improvements upon town lots, on the faith that the Government and the tribes would, in some way, provide a means for the acquisition of title.

But it was universally known that all such arrangements were restricted to the possessory use of town lots and did not involve title. If the purpose had been to make possession, or the right to possession, the test of the privilege of purchasing lots in townsites, apt language to that effect would have been used. The real pioneers in all the towns were the white people who improved the town lots under these conditions. The Indian lessors secured ample protection in the hundreds of thousands of dollars which these white people paid for the lots. The treaty itself directs the distribution of this money immediately to the members of the Tribes. The Indian lessor incurred no risk; the owner of the improvements incurred all the risk. He was protected only by the provision of the treaty which gave him the preference right to purchase the lot at less than its appraised value.

In this spirit and under this construction of the treaty hundreds of thousands of lots have been disposed of in the Chickasaw and Choctaw Nations.

We are not contending for a narrow or strained construction; ours is the natural, and in fact, the only construction which can be placed



upon the language used. The construction adopted by attorneys for plaintiffs in error necessarily interpolates into the treaty language which the owners of the townsites did not employ. They contend that although Bourland and Cross and E. H. and H. B. Johnson did not own any improvements whatever upon the lot in question at the time it was scheduled and patented, they were entitled to purchase it because their predecessors had leased the lot to the predecessor of defendant in error, Riddle.

The fact that in this case the tenant is not the active agent in the disposition of the title should be considered; that Congress and the Tribes took the initiation and designated the tenant in this case, because he was the owner of the improvements, as the person who should have the right to acquire the title; and he acquired it under the terms of the treaty. His relation to Fitzpatrick and Bourland and Cross as tenant of the possessory claim to the lot, could, in no way, overturn the provision of the treaty and confer the right to purchase on persons to whom this privilege was not given by the treaty.

His possession of the lot was not the basis of his right to purchase; he did not use his pos-

session of the lot as a means of acquiring the title, but depended upon the ownership of the improvements which were erected lawfully long prior to the date of the treaty.

We submit that the right to purchase on the part of Ellis or Riddle does not in any way depend upon a breach of the contract of tenancy. The right to purchase does not arise out of the tenancy under the possessory claim. It is absolutely independent of that relation. It has its foundation in the terms of the treaty, conferring the right to purchase on the owner of the improvements.

Our construction of the provision of the Choctaw and Chickasaw treaty, on the subject of the disposition of town lots, is strengthened by consideration of what is known as the "Curtis Act," and the treaties ratified by Congress with the Cherokee and Creek tribes.

The Curtis Act, approved June 28, 1898, 30 Stat. L. 495, in section 15, provided for the creation of a Townsite Commission for the Chickasaw and Choctaw, Creek and Cherokee tribes, to consist of one member appointed by the chief executive of the tribe, one by the secretary of the interior and one to be selected by each town where

lots were to be disposed of. In that act there was no expressed provision that the owner of improvements on the town lots should have the unconditional right to purchase, but it was provided that after the lots were appraised the owner of the improvements thereon should have the right to deposit the appraised value of the lot in the treasury of the United States at St. Louis, which deposit should be deemed a tender to the tribe of the purchase money for the lot. And when the purchaser made all the payments, it was provided that he could file a petition in the proper United States Court for the condemnation of the lot.

It was provided, however, that if what is known as "The Atoka Agreement" should be ratified on or before the first day of December, 1898, then "The Atoka Agreement," as to the disposition of town lots, etc., should become effective. The Agreement was ratified and became effective, superseding the Curtis Act on the subject under discussion. This "Agreement" contains the unqualified provision that the owner of improvements on each lot shall have the right to purchase the lot at the percentage of the appraised value mentioned therein.

The Cherokee tribe made an agreement with

the "Daws Commission," which was ratified August 7, 1902, superseding the provisions of the 15th section of the Curtis Act in so far as the disposition of town lots was concerned, and made important changes, particularly with reference to the persons entitled to purchase lots. We invite careful consideration of this "Agreement," 32 Stat. L. 616.

The 39th section of the agreement provides that whenever any tract of land should be set aside by the Secretary of the Interior for town-site purposes, as provided in the act of May 31, 1900, or by the terms of the Agreement, which tract of land is occupied at the time of such segregation by any member of the Cherokee Nation, shall be allowed to purchase any lot upon which he has improvements other than fences, tillage and temporary improvements, or if he should so elect, the lot should be sold under rules and regulations prescribed by the Secretary of the Interior, and he should be compensated for his improvements thereon, out of the fund of the tribe arising from the sale of town lots.

Sections 41, 42 and 43 of that Agreement read as follows:

"Any person being in possession or having the right to the possession of any town lot or

lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress approved May thirty-first, nineteen hundred (31st Stat., page two hundred twenty-one), the occupancy of which lot or lots was originally acquired under any townsite Act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

“Any person being in possession of, or having the right to the possession of, any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress approved May thirty-first, nineteen hundred (31st Stats. page two hundred twenty-one), the occupancy of which lot or lots was originally acquired under any townsite Act of the Cherokee Nation, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

“Any citizen in *rightful possession* of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof: Provided, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof.”

Special attention is called to the fact that by these provisions of the treaty, the right to purchase was given to persons having possession, or having the right to the possession of town lots, where the occupancy of such lot or lots was originally acquired under any townsite Act of the Cherokee Nation, upon paying the percentage of the appraised value mentioned in the treaty. This is a clear recognition of the "prior holding of the lot" as a basis for the right of purchase, and if counsel were construing the Cherokee Treaty, their theory on this point would have been correct. "The prior holding of the lot," in the Cherokee Nation, was made the basis of the right to purchase, because the Cherokee Nation had adopted its own statutes and regulations for the disposition of town lots, and provided for the appointment of a Townsite Commission, etc. See Cherokee Laws 1892, pages 381-382. The Cherokee Nation having disposed of lots in its towns, and collected the purchase money therefrom, felt under obligations to confer the right of purchase under the treaty upon persons having the possession, or right of occupancy, under any townsite law of that Nation, whether the lot was improved or not. If the lot was improved, the

persons in possession, or having the right of occupancy, were permitted to buy the lot at one-fourth of its appraised value. If he had no improvements on the lot, he was required to pay one-half of the appraised value. As stated above, here the "previous holding of the lot" was expressly made as the basis for the title, which was to be consummated in the execution of the patent. But no such condition was provided in the Chickasaw and Choctaw treaty. In the making of both these agreements, the United States was represented by the "Daws Commission," and the language in the two treaties was aptly employed to meet the conditions prevailing in each of the tribes. In the Chickasha and Choctaw Nations there were no statutes and regulations providing for the disposition of town lots prior to the adoption of the treaty, and it was thought wise to give the owner of the improvements on each town lot in these tribes the preference right to purchase, without regard to the "previous holding of the lot." We have not had access to the statutes of the Creek Nation, and do not know whether in that Nation provision had been made for the sale of town lots before the Curtis Bill or the Supplemental Treaty between the United States and the Creek Tribe were adopted, but for some rea-

son, growing out of the local conditions in the Creek Nation, the "Daws Commission" agreed to a provision for the purchase of town lots, similar to those which were adopted for the Cherokee Nation. The "Supplemental Treaty" with the Creek Nation was adopted March 8, 1900, 31st Stat. L. 861. By the 11th provision of that Act or Treaty it was provided that any person in rightful possession of any town lot, having improvements thereon, other than temporary buildings, fences and tillage should have the right to purchase such lots by paying one-half of the appraised value. Under this provision, in order to have the preference right to purchase, the purchaser must have both the rightful possession and own improvements on the lot. By section 12 of that treaty it was provided that any person having the right of occupancy of a residence or business lot, or both, whether improved or not, and owning no other lot or land in the town, should have the right to purchase such lot by paying one-half of the appraised value. By section 13 of the Act, it is provided that any person holding lands within a town, occupied by him as a home, and any person who had, at the time of the signing of the agreement, purchased any lot, tract or parcel of land therein, or any person in legal possession



at the time should have the right to purchase the lot on paying one-half of the appraised value, not, however, exceeding four (4) acres. Other provisions were made for the purchase of lots on conditions named in the treaty.

The fact that the "Daws Commission," representing the United States, made different provisions with each of these tribes for the disposition of town lots is significant. And the further fact that in both the Creek and the Cherokee Nations the "manner of the previous holding of the lot" was made the basis of the right to purchase, when no such provision was made in the Choctaw and Chickasaw Treaty, is also significant.

No uniform rule for the disposition of town lots was adopted in making these treaties. Each tribe had its own conditions to contend with, and insisted on apt provision being inserted in the treaty to carry its own policy.

We submit that in determining the right to purchase under the Cherokee and Creek Treaties, the "manner of the previous holding of the lot" must be looked to, because the Treaty so provided. But in the case of the Choctaw and Chickasaw Treaty, no such provision is made, the preference right to purchase being conferred solely on the

owner of the improvements on the lot. The provision of the Treaty is so plain that the rules of construction need not be resorted to. There can be no such thing as the intent of a statute not expressed in its words. This rule is aptly expressed in section 388, Vol. 2 of Lewis' Sutherland Statutory Construction, as follows:

“While the object of all construction and the purpose of all rules of interpretation is to ascertain the legislative intent, and while, in construing a particular part of a statute, the whole act may be regarded and all other acts bearing on the subject, and all extraneous circumstances which the legislature may be supposed to have in mind may be properly taken into consideration, yet the intent which is finally arrived at must be an intent consistent with, and fairly expressed by the words of the statute themselves. A legislative intention not expressed in some appropriate manner has no legal existence.”

“The previous holding of the lot” in this case began in 1892, between two non-citizens of the tribe. It would have been competent for Congress and the tribes to make the manner of this “previous holding” the basis for title, but they did not do so. “The previous holding of the lot” referred to by counsel did not concern the title, but related wholly to the possessory claim. Contracts with reference to posses-

sory claims, whether in the form of leases or involving the delivery of possession were valid as between the parties, but void as against Congress and the Tribes.

The difficulty with counsel is that they are arguing an assumed case not justified by the record. They are assuming that the improvements were not rightfully on the lot, which the facts as found show that they were not only lawfully owned but rightfully so under the terms of an agreement, which agreement did not contemplate they should be removed.

The construction of this provision of the Treaty by the Supreme Court of Oklahoma is in harmony with the views of the Circuit Court of Appeals as expressed in the case of *Frier v. Washington*, 128 Federal 280, which case is relied on by plaintiff in error. Judge Thayer, in delivering the opinion of that court stated:

“It is true that the Act concedes to the owner of improvements upon any townsite lot the preference right to purchase the lot after the townsite has been surveyed and platted, and the lots have been appraised, on making certain specified payments within a certain period, but it does not appear in the present instance that any of these things have been done or that the time has arrived when a purchase can be effected.”

It is very clear to our minds that the cases relied on by counsel for plaintiffs in error, and the leading case being *Rector v. Gibbon, supra*, are inapplicable to the facts in the case before the court.

That case was a bill in equity brought by the plaintiff, Rector, to charge the heirs of David Ballantine as trustees of certain property in the Hot Sprigs Reservation in the State of Arkansas, and compel them to convey it to him. It appears that the plaintiff entered upon the parcels of land in controversy in 1839, and remained in exclusive possession until 1876, when they were taken in charge by the court of claims, under the provisions of an Act of Congress, passed in 1870. The title to the land in controversy was held to be in the United States, but on suggestions of the Supreme Court, an Act of Congress was passed providing for the acquisition of title. In 1873, with the consent of Rector, the land was leased, sub-let to Gibbon and Kirkpatrick for the purpose of constructing a hotel, bath house and out-houses thereon, in consideration of an annual rent.

The court correctly held that Rector was the person for whose benefit this section of the stat-

nte was passed. In the light of the history of the litigation and the efforts to settle and build a city upon the Hot Springs Reservation, as recited in the opinion, no other conclusion could have been reached. He claimed the right to purchase the lot under a New Madrid Certificate more than fifty years old. For nearly that length of time he and others similarly situated had asserted title to the lot.

The "prior holding of the lot" was validated and the manner of that holding was made the basis for the acquisition of title, but in the case at bar the "prior holding of the lot" was not validated, the right to purchase being given only to the person owning improvements on the lot.

Both parties have proceeded from the beginning of this litigation on the theory that the ownership of improvements carried with it the exclusive right to purchase the lot upon which the improvements are situated, and this is the theory adopted by the Land Department as well as the trial court and Supreme Court of the state. The purpose of the whole litigation has been to determine the ownership of the improvements, realizing that when that question is finally determined

there can be no further question as to the person to whom Congress granted the right to purchase the lot.

The question of the ownership of the improvements involved merely a question of fact which, when determined by the land department, is conclusive both on the State and Federal Courts.

**The final decision of the land department on a question of fact between contestants over public lands, and the deduction drawn by said officers and the final conclusion reached upon the evidence are conclusive and binding upon the court.**

*Greenameyer v. Coate*, 212 U. S. 434.

*Potter v. Hall*, 189 U. S., 48 L. Ed. 817.

*Marquis v. Frisbie*, 101 U. S. 473, 25 L. Ed. 802.

*Lee v. Johnson*, 116 U. S. 48, 30 L. Ed. 570.

*Johnson v. Townsley*, 13 Wall. 72, 20 L. Ed. 485.

*Warren v. Van Brundt*, 19 U. S. 646, 22 L. Ed. 217.

*United States v. Minor*, 114 U. S. 233, 29 L. Ed. 110.

*Baldwin v. Starks*, 107 U. S., 27 L. Ed. 526.

*Gardner v. Bonstell*, 180 U. S., 45 L. Ed. 575.

*Johnson v. Drew*, 171 U. S., 43 L. Ed. 91.

### **FINDING OF FACTS.**

The land department made the following findings of facts which were substantially the findings of the trial court, concurred in by the State Supreme Court:

“FIRST: I find that the lot involved in this controversy is the same lot described in the pleadings and judgment in a certain unlawful detainer suit wherein Theodore Fitzpatrick was plaintiff and J. P. Ellis defendant, No. . . . , and it appears from the description of said lot in said pleadings and judgment that neither the number, size or survey of same were changed by the Townsite Commission for the Chickasaw Nation.

“SECOND: I find from the evidence that said Theodore Barnhart for a valuable consideration, sold and transferred all of said improvements and the occupancy of said lot to one J. P. Ellis sometime in the latter part of the year 1897, and that the said Ellis thereafter erected other and additional improvements upon said lot to the value of about \$75.00.

“THIRD: I find that on the 28th day of June, 1898, the date of the final ratification of the Atoka Agreement, the said J. P. Ellis was the exclusive owner of said improvements aforesaid, and all the improvements upon said lot.

“FOURTH: I find that on or about the 7th day of July, 1898, the said Theodore Fitzpatrick filed his suit in unlawful detainer in the United States Court at Chickasha, against the said J. P. Ellis, for the possession of said lot, and that thereafter he filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendants from preventing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the law to purchase said lot; that said injunction was by the court refused; that said Ellis filed his answer in said cause, denying the allegations of said complaint and as a further defense set up the fact that he was the exclusive owner of permanent substantial and lasting improvements other than temporary house, tillage and fencing, upon said lot.

“FIFTH: I find that in October, 1900, said cause came on for trial before the court and jury and that the issues were found in favor of plaintiff for the possession of said lot. That thereafter the defendant Ellis prosecuted an appeal to the Indian Territory Court of Appeals, which was by the court on the ..... day of ..... 1902, affirmed, and he further prosecuted a writ of error from the decision of that court to the Circuit Court of Appeals for the Eighth Circuit at St. Louis, and that in November, 1902, said decision of the Indian Territory Court of Appeals



and likewise the decision of the United States Court at Chickasha was affirmed.

“SIXTH: I find that none of the improvements upon said lot were in any way in issue in said unlawful detainer suit, and that said J. P. Ellis’ ownership of same was not denied or disputed either by the plaintiff or by the pleadings, but in the pleadings and the evidence the said Fitzpatrick admitted the ownership of said improvements to be in the said Ellis, and they were in no way adjudicated upon in said cause.

“SEVENTH: I find that on the 8th day of April, 1899, and while said unlawful detainer suit was pending, the said Theodore Fitzpatrick by his quit-claim deed transferred and quit claimed to one Ella Cross what interest he had or claimed within and to said lot; and I find that said Fitzpatrick did not claim to own any improvements upon said lot and did not intend or attempt to transfer the same to the said Ella Cross and it is not contended that the said Ella Cross by said quit-claim deed purchased any interest in said improvements; and I further find that the said Ella Cross and J. E. Cross by their certain quit-claim deed, on the 18th day of September, 1900, quit claimed their one-half interest within and to said lot to the said R. M. Bourland.

“EIGHTH: I find that on the date said townsite of Chickasha was laid out by the Townsite Commission for the Chickasaw Nation and on the date the plats thereof prepared by said Commission were finally approved by the Secretary of

the Interior, the said J. P. Ellis was the owner of permanent, substantial and lasting improvements other than fences, tillage and temporary houses on said lot.

“NINTH: I find that contestant’s grantors, Bourland and Cross, caused their attorney to appear before Roy G. Bradford, one of the clerks of said Townsite Commission, and represented to the said Bradford that said lot was in litigation and the said Bradford was led to believe that the improvements upon said lot were likewise in controversy or in litigation, and that under said impression the said Bradford made a temporary notation opposite the schedule of said lot upon the record, the words ‘in litigation,’ but that said notation was only intended to be temporary and for further investigation.

“TENTH: I find that afterwards contestees herein purchased the improvements upon said lot from the said J. P. Ellis and secured a bill of sale or tranfer thereof and went before said Commission and presented said bill of sale and certified that they were the sole and exclusive owners of all improvements situated upon said lot and that the same was not claimed by any one else, and one J. B. Kelsey, a duly authorized clerk of said Commission, ascertaining that said lot had been erroneously marked in litigation, erased the same and duly scheduled the same to said contestees herein.

“ELEVENTH: I further find that as a matter of fact said improvements at the time the same

were scheduled to contestees were not in any way in litigation, and that said contestants nor neither their grantors made any claim before said Commission that said improvements were in litigation or that they owned any interest in said improvements and made no request or demand that said lot be scheduled to them by virtue of being the owners of any improvements upon the same.

“TWELFTH: I find from the evidence that about the first of June, 1902, said Commission proceeded to Chickasha to serve notice upon all persons to whom lots had been scheduled and appraised of their right to purchase said lots under the provisions of the Atoka Agreement, and that notice was duly served upon contestees herein, on or about the 12th day of June, 1902, of their right to purchase said lot under the provisions of the Atoka Agreement, and that they duly acknowledged receipt of said notice and about the 19th day of said month they, according to the rules and regulations of the department, forwarded to the Honorable J. Blair Shoenfelt, United States Indian Agent, at Muskogee, Saint Louis Exchange for the sum of \$375.00, the same being 62½ per cent of the appraisement and the full purchase price of said lot, and that said agent, on or about the 29th day of said month, duly acknowledged receipt of said money as the full purchase price of said lot.

“THIRTEENTH: I further find that one of the contestants, H. B. Johnson, at all times prior

to and until after the schedule of said lot to the contestees herein, recognized and acknowledged the said J. P. Ellis and his grantees, contestees, to be the owners of said lot, and that recognizing said ownership on the 1st day of January, 1902, he rented a portion of said lot from the said J. P. Ellis and expressly in said lease acknowledged the said Ellis to be the owner of said lot.

**The Supreme Court in the review of cases from the state courts will follow the findings of facts of those courts.**

*Gardner v. Bobestee*, 180 U. S. 362, 45 L. Ed. 574.

*Christman v. Miller*, 197 U. S. 313, 49 L. Ed. 770.

*Chatman & D. Land Co. v. Bigelow*, 206 U. S. 41, 51 L. Ed. 953.

*Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220.

**The Land Department agreed with the contention of counsel for plaintiff in error as to the effect of the tenant disputing his landlord's title. The land department stated:**

“The tenancy having been terminated in April, 1898, what was the effect of the ownership of the improvements? Ordinarily where there is an express provision for the removal of improvements, a reasonable time after the expiration of the term is allowed for that purpose. Failure in this particular will, in

the absence of some circumstance to change the rule, cause the improvements to inure to the landlord.”

Then the Commissioner proceeds, and holds that Fitzpatrick by positive and affirmative acts waived his right to take advantage of the forfeiture.

This finding of the Commissioner involved an intent on the part of Fitzpatrick, and a question of ~~fact~~ <sup>intent</sup> necessarily involves a question of fact.

In effect the same finding was made by the Special Master and affirmed by the court as follows:

“I have carefully examined the record before the Department and while I do not believe the conclusion finally arrived at by the Department with respect to the *waiver* and *forfeiture* is sustained by the evidence, I find under the authorities that the question of waiver is a mixed question of law and fact. It particularly involves an intent and as a question of intent is to be determined from the party's actions, surrounding circumstances, as well as the evidence. \* \* \* I do not believe that the court has authority to review the Department's action on this question.”

In support of the proposition that a mixed question of law and fact is conclusive upon the court see *Potter v. Hall*, 189 U. S. 292, a case ap-

pealed from the Oklahoma Supreme Court, wherein this proposition was sustained; also the case of *Lee v. Johnson*, 116 U. S. 48, where this language is used:

“The court does not interfere with the title of a patentee when the alleged reason relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony.”

The contention of opposing counsel with respect to the forfeiture is illogical. The plaintiffs in error claimed neither the improvements, except by forfeiture, nor the title to the lot, nor did they even assert the right to purchase under the treaty. Forfeiture never inures to the benefit of strangers to the title. If a forfeiture of the improvements occurred in this case, they became a part of the realty and inured to the benefit of the tribe.

Every lawyer who practiced in the Five Tribes knows that the provision of the Act of 1898, with reference to the sale of town property, was to enable the pioneers, who, by reason of their labor and enterprise, had builded towns and cities, to break away from the feudalism of Indian landlords and procure title to their lots, whose value had been so much enhanced by their labor.

By way of illustration, we may cite an instance of a single town, whose situation was similar to that of hundreds of other towns in Indian Territory. The several thousand inhabitants of the Town of Ardmore, at the time of the passage of the Curtis Act, were paying rents to an Indian landlord, one Richard McLish. If counsel's contention is correct, it was McLish and not the thousands of owners of improvements who occupied the **various lots** in Ardmore, who had the right to purchase these lots; and the Townsite Commission assisted these people in perpetrating a grievous fraud upon McLish. It should be stated, however, in justice to Mr. McLish, that he never claimed such a construction of the law, and so far as our experience personally goes, there was but one Indian landlord in the entire Five Tribes that **did claim** such a construction.

If the Department rightfully decided the question under the statute, then it cannot be said that it committed an error which a court of equity may correct.

In other words, to apply the rule contended for would be to hold that although the Department decided correctly under the law yet this court will hold that it decided erroneously in order to decree

that the plaintiffs hold the property in trust for the defendants, because a court of equity does not disregard the statute for the purpose of determining the equities of the parties, but determines their equities based upon and created by the statute. In other words, if the Department has correctly decided the question under the statute, then it committed no error for this court to correct.

This we think is the universal holding of the courts, especially the Supreme Court of the United States and the Supreme Court of Oklahoma, and the court will not be authorized to read into the statute exceptions not warranted. On this point we desire to quote from the case of *United States v. Goldberger*, 168 U. S. 102. Mr. Justice Brewer delivering the opinion of the court uses this language:

“The primary and general rule of statutory construction is that the intent of the law maker is to be found in the language he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislature. It is true there are cases in which the letter of the statute is not deemed controlling but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and



accurately disclose the intent. *No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.*"

Applying this doctrine to the case at bar, did the Department come to an erroneous decision upon undisputed questions of fact? Did it give to one man under the law property legally belonging to another? Was it justified in reading into the statute that in cases where the tenant was the absolute and unquestioned owner of the improvements the statute meant that the landlord should have the preference right? Did the Department have and has the court the right to resolve itself into a legislative body and conclude that the omission of the law makers to make exceptions in favor of landlords justifies the court in making that addition for the reason it appears that the legislature omitted that important exception? Did the Department have the right and has the court a right to say that it appears that the legislature failed to provide for such contingencies which it appears should have been done and that the court will make such an exception and provision? To carry out counsel's conclusion although the Department committed no error, but decided the

question right and proper under the statute, yet the court should, notwithstanding that fact, create and enforce an equity. Would it not be in direct conflict with the rule laid down by Justice Brewer in the opinion above referred to?

In reviewing the decision of the state court, adverse to a title which depends on the construction of an act of Congress, The Supreme Court of the United States cannot take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but is confined to an examination of the validity of the title under that statute.

*Matthews v. Zane*, 7 Wheat. 164, 5 L. Ed. 425.

*Lewis v. Lewis*, 9 Mo. 190.

*Magwire v. Tyler*, 47 Mo. 126.

The case of *Magniac et al v. Thompson*, reported in 15 Howard U. S., Book 14, L. C. P. 696. Quoting from the bottom of page 703:

“Wherever the rights or the situation of parties are clearly defined and established by law equity has no power to change those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.”

Again, quoting from page 705:

“Such being our conclusions upon this

branch of the case the same conclusions being implied in the application of the appellants for equitable interposition, the inquiry here presents itself whether a court of equity can be called upon to abrogate or impair or in any manner or degree interfere with clear, ascertained and perfect legal rights. The simple statement of such an inquiry suggests one correct reply. Equity may be invoked to aid in completion of a just but imperfect legal title or to prevent the successful assertion of an unconscientious and incomplete legal advantage, but to abrogate and assail a perfect and independent legal right it can have no pretensions. In all such instances equity must follow, or in other words, be subordinate to the law."

Other reasons why the defendants' contention in this case is not sound and why the judgment of the trial court should be affirmed:

FIRST: Neither defendants nor their predecessors in interest had any legal or equitable right as against the Chickasaw and Choctaw Nations and the Government, or any claim preventing the Government from disposing of the property in any way it might see proper, since they did not own the improvements. Quoting from the case of *Gonzales v. French*, 164 U. S., Book 41, p. 461, the Supreme Court stated:

"Whatever may have been the possessory rights of the plaintiff in error as against other

claimants under the ordinary land laws such rights could not avail against the right of Congress to confer said lands upon other parties."

*Frisbie v. Whitten*, 76 U. S., 9 Wall. 187, Book 19, p. 668.

*Hutchins v. Law*, 82 U. S., 15 Wall. 77, Book 21, p. 82.

*Shepley v. Cowan*, 91 U. S., Book 23, p. 424.

"The settlement even when accompanied with the improvements of the parties, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper. The power of disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by law for the acquisition of a title, including the payment of the price of the land, have been performed by the settler. When these prerequisites were complied with the settler *for the first time* acquired a vested interest in the premises of which he could not be subsequently deprived."

*Gonzalas v French*, *supra*.

In connection with the above authorities we cite and quote from two decisions of the Circuit Court of Appeals, which lay down the same rule:

"Where a party has not placed himself in a position to create a right in himself as against the Government in regard to public or *quasi*-public lands of the United States, then he is in

no position to warrant a court of equity in giving him relief against the successful purchaser of such land."

This doctrine is laid down and well illustrated in the late case of *Campbell v. Weyerhaeuser et al.*, reported in 88 C. C. A., 412, opinion by the Circuit Court of Appeals for the Eighth Circuit, April 17, 1908, by Presiding Justice Sanborn. From the syllabus it is stated:

"One who has never by acceptance of a grant or by settlement and improvements or by entry or by payment placed himself in privity with the United States title before a patent issues to enter may not maintain a bill in equity to charge the title under it with a trust in his favor. One whose application to purchase is rejected when presented may not maintain such a suit."

Also to same effect see *Norton v. Evans et al.*, 27 C. C. A. 168, opinion rendered from the same circuit by Justice Brewer. In concluding the opinion Justice Brewer states as follows:

"He is in no better position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States and does not interfere with the power of Congress by subsequent legislation to dispose of the land."

Citing several authorities.

Apply the above doctrine to the case at bar. As shown by the decision of the land department

the defendants have never in any way placed themselves in a situation or connected themselves with the title to the lot in question so as to have any rights against the United States, so as to bring themselves in any sense under the provision of the Act of Congress to entitle them to purchase. The only wrong they charge against the plaintiff is that by reason of the law giving J. P. Ellis, plaintiff's predecessor in interest, the right to execute a supersedeas bond, and by reason of the fact that Ellis exercised his right under that law, then that he thereby committed a great wrong upon the defendants and prevented them from doing that which they say they intended to do. The Interior Department, however, as well as the trial court, upon questions of fact, found that the defendant's predecessors sought an injunction from the court of equity to enjoin the plaintiff's predecessor from preventing them taking possession of and improving the said lot, but that said injunction was denied. The finding of the trial court is in this language:

“And that thereafter he (Fitzpatrick) filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendants from prevent-

ing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the terms of the Curtis Act to purchase said lot. That said injunction was by the court refused.”

On this point we respectfully call the court’s attention to the language used by the opinion of the Secretary of the Interior upon the petition for re-hearing, prepared by the Attorney General for that department, as follows:

“It is quite manifest that the contestants who claim to be alleged purchasers from said Bourland and Cross long after said lot was scheduled to the contestees, have no right to demand that the schedule be changed and patent issue to them. They do not claim to have been owners of the lot when it was appraised by the Townsite Commission, and the law requires that the lot shall be scheduled to the owners of improvements at the time the schedule and appraisal are made.”

In *Burke v. Southern P. R. Co.*, 234 U. S. 669, 58 L. Ed. 1527, it was said by this court:

“Persons not in privity with the government in any respect when a patent was issued under the railway land grant act of July 27, 1866, 14 Stat. at L. 292 (Chap. 278), cannot attack such patent on the ground of fraud, error, or irregularity in the issuance of the patent.”

Applying this doctrine in connection with the

doctrine laid down by Justice Brewer in the case of *United States v. Goldenberger, supra*, it is clear that Congress had the authority as well as the right to confer the right to purchase lots in the Chickasaw and Choctaw Nations upon the owners of improvements solely, and prescribe the manner of such purchase, and that too without regard to the contractual relations, if any, theretofore existing between other parties; if it is plain that Congress has sought to do so, then it is the duty of the courts to carry out the intent of the law-makers. What right did the defendants in this case have in the property in question that Congress was compelled to recognize?

Suppose the tenant was in possession of the lot with only a fence and temporary improvements, which were not sufficient under the terms of the statute to entitle him to purchase, and he refused to improve, to comply with the law and by force prevented the landlord from improving, and wrongfully kept the landlord out of possession, and when the time arrived for the Townsite Commission to schedule and sell the lot neither the landlord nor the tenant had complied with the treaty, although they might hold that the landlord had been wronged by



the tenant, yet would there be any alternative except to sell the lot at public sale? Suppose, on the other hand the claimant of the lot should make a lease contract and lease it to a party, with the privilege of improving, but the tenant was unable to improve and secured the assistance of a third party under an agreement that he would put substantial and lasting improvements on the lot, that the title to the improvements should remain in the third party, and it being conceded that title to the lot was in the Chickasaw and Choctaw Nations, and the Townsite Board should arrive to execute the law in question and found the lot in this condition, would it not be their plain duty to ignore the claims of either the landlord or the tenant and schedule the lot to the conceded owner of the improvements, although the landlord might have a suit pending against the tenant for possession of the lot and although the tenant might be contesting his right to possession and remain in possession of the lot by virtue of a supersedeas bond while the case was on appeal?

“A court of chancery does not make titles where there are none, but only will compel persons who obtained the legal title unjustly

and by fraud to restore it to those who under the law are entitled thereto."

*Willet v. Overton*, 2 Root 338.

"In equity as well as in law the plaintiff must recover on the strength of his own title and not on the weakness of his adversary, and a complete equitable title must be shown to entitle the plaintiff to recover, as in law a complete legal title must be shown."

*Grand Gulf R. R. Co. v. Bryan*, 16 Miss. 8 Smeds. & M. 234.

*Bock v. Perkins*, 139 U. S., Book 35, p. 314.

The general rule that the tenant is estopped from questioning and disputing his landlord's title has exceptions which are as well founded as the rule itself.

To support the above proposition we cite the following authorities:

*Welker v. McComb*, 30 S. W. 822.

*McKie v. Anderson*, 14 S. W. 576.

The rule may be waived:

*Wood v. Chambers*, 3 Rich. Law 150.

*Camp v. Camp*, 5 Conn., 13 A. D. 60.

Party may show a superior title before surrender.

*Dodge v. Phelan*, 21 S. W. 309.

*Wild's Lessees v. Serpell*, 10 Grant. 405.

Tenant may also show his landlord's title has expired.

*Rider v. Mansell*, 66 Mo. 167.

*Bigler v. Furman*, 58 Barb. 545.

*McGuffy v. Carter*, 4 N. W. 211.

*Jackson v. Rayland*, 22 A. D. 557.

*Rhyne v. Guevera*, 67 Miss. 139.

*Devacht v. Newman*, 3 Ohio (3 Hain.) 57.

*Harvey v. Harvey*, 2 S. E. 3.

The rule that the tenant cannot deny his landlord's title is limited to suits for possession only and does not apply to an action of trespass to try title and for partition, in which the title itself is put in issue.

*McKie v. Anderson* (Tex.), 14 S. W. 576.

*Bartley v. McKinney*, 28 Grant 750.

The rule that the tenant cannot show that his lessor never had title is for the benefit of the lessor and may be waived by him.

*Wood v. Chambers*, 3 Rich. Law 150.

*Wilson v. Cleveland*, 30 Cal. 192.

*Tewkbury v. Magraff*, 33 Cal. 237.

*Camp v. Camp*, 5 Conn. 291, 13 A. D. 60.

An estoppel, created by a lease, operates to give full effect to the contract, but beyond that

terminates with the estate demised and the tenant may then set up a pre-existing title in himself even against the lessor.

*Page v. Kinsman*, 43 N. H. 328.

After surrendering the lease the lessee may without surrendering possession assert claim to a superior title.

*Dodge v. Phelan*, 21 S. W. 309.

A tenant who surrenders possession at the end of his term, or from whom possession is recovered is not concluded by the former existence of such tenancy or by his former lease from contesting the title of his former landlord.

*Wild's Lessees v. Serpell*, 10 Grant. 405.

The rule that a tenant cannot dispute the title of his landlord applies only to the title the landlord had at the inception of the lease.

*Towne v. Butterfield*, 93 Mass. 100.

*Wolf v. Johnson*, 30 Miss. 513.

*McAusland v. Pundt*, 1 Nebr. 211, 93 A. S. 358.

The general rule that a tenant will not be permitted to question his landlord's title so long as he holds the possession originally derived from him does not forbid the tenant from showing that

the landlord's title has expired or been extinguished since the tenancy commenced.

- Martin's Heirs v. Reynolds*, 39 Ky. (9 Dana), 328.  
*Farris v. Houston*, 74 Ala. 162.  
*Robertson v. Biddell*, 32 Fla. 304, 13 South 358.  
*Winn v. Strickland*, 34 Fla. 610, 15 South 606.  
*Tilghman v. Little*, 13 Ill. (3 Peck.), 293.  
*St. John v. Quitzow*, 72 Ills. 334.  
*Kinney v. Laman*, 8 Blackf. 350.  
*Casey v. Gregory*, 52 Ky. (13 B. Mon.), 505, 56 A. D. 581.  
*Giles v. Ebsworth*, 10 Md. 333.  
*Wolf v. Johnson*, 30 Miss. 513.  
*Robinson v. Troup Min. Co.*, 55 Mo. App. 662.  
*Russel v. Allard*, 18 N. H. 222.  
*Howell v. Ashmore*, 28 N. J. Law (2 Zab.), 261.  
*Horner v. Leeds*, 25 N. J. Law (1 Dutch), 106.  
*Lawrence v. Miller*, 3 N. Y. Sup. Ct. (1 Sandf.), 516.  
*Hilton v. Bender*, 4 Thomp. & Co., 270.  
*Deracht's Lessee v. Newsam*, 3 Ohio (3 Ham.), 57.  
*Franklin v. Hurlbut*, 1 White & W. Civ. Cas. Ct. App. 816.

Was the plaintiff or was his predecessor in interest ever at any time the tenant of the present

defendants, or did the relation of landlord and tenant ever exist between said parties? Our contention is that this question must be answered in the negative.

At an early date the common law doctrine in reference to an estoppel on the part of the tenant from disputing his landlord's title ceased at the expiration of the tenancy or lease contract under which the tenant entered. However, this doctrine has been since modified to the extent that it continues until possession of the premises is surrendered, except in those cases coming within the exception to the general rule, that is, that the landlord's title has expired by operation of law or otherwise; but, we contend that the authorities hold that in no case does the relation continue after the surrender of possession and expiration of the term.

The record in the case before the court shows that if the relation of landlord and tenant ever existed between Ellis and Fitzpatrick it was from month to month. Then according to the contention of the defendants that Ellis, the tenant, repudiated Fitzpatrick's title and set up title in himself, might he terminate the relation? Upon that theory a suit of unlawful detainer was filed on the 7th of July, 1898. In January, 1903, the plaintiffs hav-

ing succeeded in that case, *Ellis was dispossessed and possession given to Fitzpatrick or Bourland and Cross*. At no time prior thereto did the present defendants claim or in any way assert any interest in the premises. In May, 1903, for the first time, the present defendants claim to have succeeded to whatever interest Bourland and Cross claimed.

Now, the question arises, if the relation of landlord and tenant did not cease between Ellis and Fitzpatrick, when would it ever cease? Conceding that the relation did exist between Fitzpatrick and Ellis prior to the bringing of the unlawful detainer suit, after that suit for possession had been concluded, possession surrendered thereunder and the plaintiff and his successors placed in possession, is it possible for the present defendants who afterwards claim to have purchased what interest Bourland and Cross claimed, to successfully plead an estoppel upon the plaintiff in this suit, brought not for the possession alone but for the purpose of trying title? We respectfully submit that under the authorities the relation of landlord and tenant and the doctrine of estoppel does not extend that far, and in support of this we desire to cite Enc. of Law, under

head of Landlord and Tenant, pp. 421-422: *Peyton v. Stitch*, 5 Peter (U. S.) 485. Also:

- Smith v. Mundy*, 18 Ala. 182.
- Bishop v. Blair*, 36 Ala. 80.
- Hughes v. Watts*, 28 Ark. 153.
- Wilson v. Cleveland*, 30 Cal. 192.
- Arnold v. Woodward*, 14 Colo. 164.
- Welborne v. Hood*, 68 Ga. 825.
- Wycoff v. Miller*, 48 La. 475.
- Heath v. Williams*, 25 Me. 209.
- McCrary v. McCrary*, 90 Mich. 478.
- Crockett v. Althouse*, 35 Mo. App. 404.
- Mattis v. Robertson*, 1 Nebr. 3.
- Utica Bank v. Mersereau*, 3 Barb. 528.
- Benton v. Benton*, 95 N. C. 559.
- Hemming v. Warner*, 101 N. C. 406.
- Smart v. Smith*, 2 Dev., 13 N. C. 258.
- Boyers v. Smith*, 3 Watts. (Pa.) 449.
- Juneman v. Franklin*, 67 Tex. 411.
- Hillock v. Sutton*, 2 Ont. 548.

The doctrine as laid down in the case of *Peyton v. Stitch*, 5 Peter, *supra*, was where the tenant while in possession purchased the interest and obtained a deed from a party claiming to be a prior settler by pre-emption of the public land, and the landlord obtained a judgment in ejectment against him for possession, and he filed a bill in equity undertaking to restrain the execution of this judgment. His bill was dismissed on the ground that while in possession he could not set up that



equitable title, but was estopped by reason of the relation of landlord and tenant, but states the doctrine to be that this estoppel only existed until he had surrendered possession.

The case of *Arnold v. Woodward*, 14 Colo., was a suit similar to the case now before the court. The tenant while a tenant obtained from the United States a patent to certain land. A suit for possession was brought against him and he undertook to set up the title by the patent in defense (reported in 4 Colo. 247). The doctrine contended for above was laid down in both the 4 Colo., and also in the 14 Colo., *supra*. In the second Colorado case above referred to they also recognize the exception to the general rule of estoppel on the part of the tenant, that he may while in possession as tenant, prior to surrendering possession, show that the landlord's title has been voluntarily conveyed or has ceased to exist by operation of law; but it is not necessary for the plaintiff in the present suit to invoke that doctrine as possession had been surrendered and he is now contesting a third party who was never his landlord or the landlord of his predecessor, but was a tenant of his (plaintiff's) predecessor.

The tenant is likewise permitted to show that the title of the landlord since he entered in possession has terminated or expired by operation of law.

This is an exception to the general rule and is as well established as the rule itself.

The doctrine is upheld in England and the following cases in the American courts have also established this exception to the rule:

- Clerk v. Clark*, 51 Ala. 498.
- Farris v. Houston*, 74 Ala. 162.
- Otis v. McMillan*, 70 Ala. 46.
- Caldwell v. Smith*, 77 Ala. 157.
- Randolph v. Carlton*, 8 Ala. 606.
- Pope v. Harkins*, 16 Ala. 321.
- McDevitt v. Sullivan*, 8 Cal. 592.
- Tecksbury v. Magraff*, 33 Cal. 237.
- Wheelock v. Warschauer*, 21 Cal. 309.
- Rodgers v. Palmer*, 33 Conn. 156.
- Camp v. Camp*, 5 Conn. 291.
- Robertson v. Biddell*, 32 Fla. 304.
- Winn v. Strickland*, 34 Fla. 610.
- St. John v. Quitzow*, 72 Ill. 334.
- Wells v. Mason*, 5 Ill. 84.
- Tilghman v. Little*, 13 Ill. 239.
- Kinney v. Doe*, 6 Blackf. (Ind.) 350.
- Stout v. Merrill*, 35 Iowa 47.
- Swan v. Wilson*, 1 A. K., Marsh (Ky.) 99.

- Gregory v. Crab*, 2 B. Mon. 234.  
*Logan v. Steele*, 7 T. B. Mon. (Ky.) 104.  
*Casey v. Gregory*, 13 B. Mon. (Ky.) 508.  
*Elbus v. Randall*, 2 Dana (Ky.) 100.  
*Rydert v. Mansell*, 66 Me. 167.  
*Presstman v. Stilljacks*, 52 Md. 647.  
*Giles v. Ebsworth*, 10 Md. 333.  
*Lamson v. Clarkson*, 113 Mass. 348.  
*Emmes v. Feeley*, 132 Mass. 346.  
*Hilbourn v. Fodd*, 99 Mass. 11.  
*Indian Land & T. Co. v. Clement*, 109 Pac. 1089.  
*Dale v. Parker* (Mo.), 128 S. W. 510.  
*Grundin v. Carter*, 99 Mass. 15.  
*Niles v. Ransford*, 1 Mich. 338, 51 A. D. 95.  
*Rhyme v. Guvrara*, 67 Miss. 139.  
*Jones v. Madison County*, 72 Miss. 777.  
*Wolf v. Johnson*, 30 Miss. 513.  
*Barclay v. Picket*, 38 Mo. 143.  
*Stagg v. Eureka Tanning Co.*, 56 Mo. 317.  
*Robinson v. Troup Min. Co.*, 55 Mo. App. 662.  
*Meier v. Theiman*, 15 Mo. App. 307.  
*McAusland v. Pandt*, 1 Neb. 211, 93 A. D. 348.  
*Russell v. Allard*, 18 N. H. 222.  
*Den v. Ashmore*, 22 N. J. L. 261.  
*Hornett v. Leeds*, 25 N. J. L. 106.  
*Jackson v. Rowland*, 6 Wend. 666 (N. Y.), 22 A. D. 557.  
*Hoag v. Hoag*, 35 N. Y. 469.

- Ryers v. Farwell*, 9 Barb. (N. Y.) 615.  
*Lawrence v. Miller*, 1 Sandt. 516.  
*Lane v. Young*, 66 Hun. (N. Y.), 563.  
*Van Etten v. Van Etten*, 69 Hun. 499.  
*Lodge v. Martin*, 31 N. Y. App. 13.  
*Boyd v. Sametz* (N. Y.), 17 Misc. 728.  
*Lancashire v. Mason*, 75 N. Car. 455.  
*Deracht v. Newsam*, 3 Ohio 67.  
*West Shore Mills Co. v. Edwards*, 24 Oregon 475.  
*Newell v. Gibbs*, I. W. & S. (Pa.), 496.  
*Sparks v. Walton*, 4 Phila. 72.  
*Hill v. Miller*, 5 S. & R. (Pa.) 355.  
*Smith v. Crosland*, 106 Pa. St. 413.  
*Bowser v. Bowser*, 8 Hump. (Tenn.) 23.  
*Orleans County Grammer School v. Parker*, 25 Vt. 696.  
*Pierce v. Brown*, 24 Vt. 165.

The doctrine laid down in the above decisions is in the nature of a confession and avoidance. It does not permit the tenant to deny the landlord's title, but in effect affirms the title under which he entered, but says notwithstanding that title and notwithstanding it was valid at the time he entered, yet it has since expired by operation of law and the tenant has become the owner thereof.

"No rule of law or public policy prevents a tenant from purchasing during the term for his own benefit a title adverse to that of his landlord and after surrendering possession may set up in any character of action his title

and contest the right of his former landlord.”

This proposition is sustained by the following decisions:

*Bright v. Boyd*, 1 Story (U. S.) 478.  
*Hodgen v. Guttery*, 58 Ills. 431.  
*Green v. Detrick*, 114 Ills. 636.  
*Carson v. Crigler*, 9 Ills. App. 83.  
*Hodgen v. Shields*, 18 B. Mon. 831.  
*Kelley v. Kelley*, 23 Me. 193.  
*Pressman v. Stilljacks*, 52 Md. 647.  
*Walker v. Harrison*, 75 Miss. 665.  
*Pickett v. Ferguson*, 16 Tenn. 342.  
*Lang v. Carruthers*, 21 Tex. Civ. App. 118.

There is nothing in the case at bar in conflict with the above authorities. The tenant did not acquire his title in any sense by virtue of possession; in fact the possession had no bearing upon the acquisition of the title.

In support of the ~~proposition~~ <sup>fact</sup> of law ~~set out in the first part of this brief~~ <sup>set out in the first part of this brief</sup>, we respectfully cite the following authorities:

The case of *Bassett v. Mitchell*, reported in 3 Okla. 177, the syllabus is as follows:

“Where a settler upon a lot, claiming under the Act of Congress of May 14, 1890, fails to assert any right to the lot before the Board of Townsite Trustees, and such failure was

wholly by his own laches, he becomes thereby estopped from obtaining relief in a court of equity."

*Roberts v. Hughes*, 25 A. Rep. 270.

*Marshall v. Means*, 56 A. D. 444.

*Ross v. Singleton*, 12 A. D. 86.

*Ross v. Stewart*, 106 Pac. 870, 22 Okla.

In support of the above authority we quote again from the case of *Magniac v. Thompson*, L. C. P. (U. S.), Book 14, at bottom of page 705:

"With regard to the question raised by the demurrer as to the obligation of the appellants to pursue their remedy at law under the allegations in the bill that such legal remedy had been reserved to them by the terms of the agreement, there can be no doubt that this remedy remains unimpaired, that the appellants cannot arbitrarily abandon it and seek

the interposition of equity in a matter purely legal."

Without again quoting from the testimony and finding of facts in the record, it will be remembered that the defendants' predecessors in interest under oath admitted that they made no claim to have said lot in question scheduled and awarded to them by the Townsite Commission. The Land Department found as a matter of fact that said defendant made no such claim and failed to request the Townsite Commission to schedule and award said

lot to them, and the trial court has found as a matter of fact to the same effect.

Applying the authority to that state of facts, can the defendants now in a court of equity be heard to complain of not securing their asserted rights under the law before the proper authorities authorized to hear and determine their claim?

In the case of *Ross v. Stewart*, from the Supreme Court of Oklahoma, 227 U. S. 532, 57 L. Ed. 627, the second paragraph of the syllabus reads:

“Relief will not be given in the courts from the decision of a townsite commission for a town in the Cherokee Nation in a contest arising on conflicting application to purchase, or from the resulting patent, unless it clearly appears **that the commissioners** committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that **they themselves** were chargeable with fraudulent practices, and that as a result the patent was issued to the wrong party.”

The opinion of the Supreme Court of Oklahoma was affirmed.

This is the general rule, and that it is a sound proposition cannot be controverted, ~~and it does not conflict with the recent decision of this court in the case of *Garrett et al. v. Walcott et al.*, but~~

~~It is in harmony with the doctrine laid down in that~~  
~~case.~~

The fact that the present defendants, as well as their predecessors in interest, delayed from June or July, 1902, until January, 1906 a period of almost four years, before taking any action, might reasonably be held to be an acquiescence on the part of plaintiffs in error in the action of the Townsite Commission, and especially so when we recall such conduct and action in connection with their own sworn allegation that the temporary notation "in litigation" was perfectly satisfactory to them and that they gave the matter no further attention.

Respectfully submitted,

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Syllabus.

JOHNSON *v.* RIDDLE.ERROR TO THE SUPREME COURT OF THE STATE OF  
OKLAHOMA.

No. 161. Argued January 12, 1916.—Decided March 20, 1916.

Under the provisions relating to town sites in the Atoka Agreement between the United States and the Choctaw and Chickasaw tribes (found in Act of June 28, 1898, c. 517; 30 Stat. 495, 505, 508), the preferential right to purchase improved town lots was conferred upon the owner of "permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses," without regard to the lawfulness or unlawfulness of the previous possession of the land by the owner of the improvements.

Under the provisions of the Atoka Agreement relating to purchase of town lots (30 Stat. 508), and regulations contained in subsequent legislation, authority to appraise lots, improved or unimproved, to ascertain the ownership and value of the improvements, and to dispose of the lots in conformity to the provisions of the Agreement, was conferred upon the town site commission, and afterwards upon the United States Indian Inspector, subject to the supervision of the Secretary of the Interior.

In case of contest, the findings of fact by the Commission or the Inspector, affirmed on final appeal by the Secretary of the Interior, are binding upon the courts, in the absence of gross mistake or fraud, and the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the right of purchase, and ultimately issuing the patent, to the wrong party.

The Atoka Agreement (Act of June 28, 1898, c. 517, 30 Stat. 505, 508), when ratified by Congress and by the Choctaw and Chickasaw tribes, superseded all customs, if such there were, that had sanctioned the leasing of town lots to non-citizens of the tribes; and its provisions could not be carried into effect without terminating existing rights of occupancy, if any, saving as these coincided with the ownership of permanent improvements.

A tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law.

That a tenant holding a town lot in the Chickasaw district of the Choctaw Nation, under lease from a non-citizen having no rights

in the land, had retained possession after refusal to pay rent, thereby preventing the landlord from erecting improvements such as described in the Atoka Agreement, did not estop the tenant who had erected substantial and permanent improvements thereon from acquiring the lot in his own right under the provisions of the Agreement.

41 Oklahoma, 759, affirmed.

THE facts, which involve the title to a town lot in the town of Chickasha in the Chickasaw District of the Choctaw Nation, and the construction and application of the townsite provisions of the Atoka Agreement, the Curtis Act and other statutes affecting the property of the Chickasaw and Choctaw tribes, are stated in the opinion.

*Mr. C. B. Ames*, with whom *Mr. Alger Melton* was on the brief, for plaintiffs in error:

The decision of the townsite board as approved by the Secretary of the Interior was based on an erroneous proposition, to-wit, that the effect of the Atoka Agreement was to terminate the relation of landlord and tenant. *Ellis v. Fitzpatrick*, 64 S. W. Rep. 567; *Ellis v. Fitzpatrick*, 118 Fed. Rep. 430; *Fraer v. Washington*, 125 Fed. Rep. 280; *Shy v. Brockhouse*, 7 Oklahoma, 35; *Walker Trading Co. v. Grady Trading Co.*, 39 S. W. Rep. 354; *Kelly v. Johnson*, 39 S. W. Rep. 352; *Williams v. Works*, 76 S. W. Rep. 246.

Under the Atoka Agreement as embodied in the Curtis Act which provides that the owner of the improvements shall have the right to buy one residence and one business lot at fifty per cent of the appraised value, a tenant who has wrongfully withheld possession of such a lot from his landlord, thereby preventing his landlord from erecting improvements thereon, cannot acquire title to the lot as against the landlord. *Rector v. Gibbon*, 111 U. S. 276; *Lamb v. Davenport*, 18 Wall. 307; *Atherton v. Fowler*, 96 U. S. 513; *Ricks v. Reed*, 19 California, 551; *Goode v. Gains*, 145 U. S. 141; *Trenouth v. San Francisco*, 100 U. S.

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251; *Hagar v. Wikoff*, 2 Oklahoma, 580; *Downman v. Saunders*, 3 Oklahoma, 227.

The tenant having acquired a deed in violation of the rights of his landlord holds the title as trustee for his landlord. *Rector v. Gibbon*, 111 U. S. 276; *Baldwin v. Clark*, 107 U. S. 463; *Wallace v. Adams*, 143 Fed. Rep. 716; *James v. Germania Iron Co.*, 107 Fed. Rep. 597; *Trice v. Comstock*, 121 Fed. Rep. 620; *Bertran v. Cook*, 32 Michigan, 518.

*Mr. Joseph W. Bailey*, with whom *Mr. C. B. Stuart*, *Mr. W. A. Ledbetter* and *Mr. A. C. Cruce*, were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action of ejectment, commenced before the admission of Oklahoma as a State in the United States Court for the Southern District of the Indian Territory, and brought to a conclusion in the state courts. There have been many changes of interest *pendente lite*, and corresponding changes of parties. The original plaintiffs were Riddle, now defendant in error, and one Cook, whose interest Riddle has since acquired. The interests of the original defendants have been acquired by plaintiffs in error through mesne conveyances that will be stated below. The subject of the action is a town lot in the town of Chickasha, in the Chickasaw district of the Choctaw Nation, to which plaintiff claimed title by purchase under the townsite provisions of the Atoka Agreement with the Choctaw and Chickasaw tribes, found in the act of Congress known as the Curtis Act (June 28, 1898, ch. 517; 30 Stat. 495, 505, 508), followed by a patent executed, after the commencement of the action, in accordance with the supplemental agreement with the same tribes (Act of July 1, 1902, ch. 1362, § 51; 32 Stat. 641, 653), and

set up in a supplemental complaint. The defendants admitted the legal title to be in Riddle, but by cross-complaint sought to have him declared a trustee for their benefit and decreed to convey the title to them. A judgment refusing to declare such a trust, and awarding the lot to Riddle, was affirmed by the Supreme Court of Oklahoma (41 Oklahoma, 759), and the case is brought here, under § 237, Jud. Code, upon the ground that the decision was against rights set up by plaintiffs in error under the provisions of the Agreement.

The facts are as follows: Some years prior to the making of the Agreement, one Fitzpatrick, a white man not entitled to citizenship in any Indian tribe, made a lease of the lot in controversy, then vacant and unimproved, to one Barnhart, who went into possession and erected a substantial house and other improvements, which were to belong to him, subject to the payment of a ground rent to Fitzpatrick. There is nothing to show what right Fitzpatrick claimed or that in fact he had any right to seize upon vacant tribal lands and contract concerning them as he did. In the year 1897, Barnhart sold the improvements and transferred the possession of the lot to one Ellis, who entered into possession and made further improvements. About April 1, 1898, Ellis refused to pay rent, and on July 7, in the same year, Fitzpatrick brought a suit for unlawful detainer against him in the United States Court, alleging, in an amended complaint filed in February, 1899, that he desired possession for the purpose of being able to place upon the lot such improvements as would protect his right to the land under the provisions of the Agreement. Fitzpatrick prevailed in the United States Court, and, on appeal, in the Court of Appeals for the Indian Territory (*Ellis v. Fitzpatrick*, 3 Ind. Ter. 656; 64 S. W. Rep. 567), and also in the Circuit Court of Appeals for the Eighth Circuit, whose decision was rendered October 27, 1902 (118 Fed. Rep. 430; 55 C. C. A. 260).

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Meanwhile Ellis retained possession by means of a super-sedeas bond.

In February, 1902, the Townsite Commission for the Chickasaw Nation, organized pursuant to the provisions of the Atoka Agreement, visited Chickasha for the purpose of appraising town lots and awarding them to persons having the preferential right to purchase under the terms of the Agreement. Ellis having conveyed his rights to Riddle and Cook, the lot was scheduled to them, and on June 12, 1902, they were notified that they had the right to purchase it. A week later they availed themselves of this right by paying to the United States Indian Agent the proper percentage of the appraised value to make up the full purchase price of the lot, and took from him a proper receipt.

Pending the unlawful detainer suit, Fitzpatrick conveyed whatever interest he had in the lot to a Mrs. Cross, and she conveyed an undivided half interest to one Bourland. In January, 1903, after the decision of the Circuit Court of Appeals, Bourland and Cross obtained possession of the lot with the improvements; and in the following month the present action of ejectment was commenced by Riddle and Cook against Fitzpatrick and the persons in possession. Thereafter Bourland and Cross conveyed their interest to E. B. and H. B. Johnson, the present plaintiffs in error, and they were substituted as defendants. Riddle bought the interest of Cook, and thus became the sole plaintiff. Pending the action, a contest was instituted, either by Bourland and Cross or by the Johnsons, against Riddle and Cook, concerning the award and scheduling of the lot to the latter. The townsite commission having been abolished by the Secretary of the Interior pursuant to Act of March 3, 1905, ch. 1479; 33 Stat. 1048, 1059; the contest was heard before the United States Indian Inspector assigned to the Indian Territory, upon whom this duty was imposed by regulations ap-

proved by the Secretary. Rep. Ind. Inspec., 1905, pp. 5, 22, 23; House Doc. No. 5, 59th Cong., 1st Sess., vol. 19, pp. 705, 722, 723. The Inspector made full findings of fact, and in an elaborate opinion decided in favor of contestees. Upon appeal this decision was affirmed by the Commissioner of Indian Affairs, and upon appeal to the Secretary of the Interior it was again affirmed. These decisions proceeded upon findings to the effect that at the time of the ratification of the Atoka Agreement and at the time the townsite of Chickasha was laid out by the Townsite Commission, and when the plats prepared by the Commission were finally approved by the Secretary of the Interior, Ellis was the owner of permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, on said lot; that none of these improvements was in any way in issue in the unlawful detainer suit, and Ellis' ownership of them was not denied or disputed, but on the contrary was admitted by Fitzpatrick in his pleadings, and they were in no way adjudicated upon in that suit; that Riddle and Cook afterwards purchased the improvements from Ellis, and having received notice from the Townsite Commission, as already mentioned, of their right to purchase the lot under the provisions of the Atoka Agreement, they forwarded to the United States Indian Agent the proper percentage of the appraisement to make up the full purchase price of the lot, and received his receipt for the same. After the final determination of the contest before the Department of the Interior, a patent was issued to Riddle and his associate, dated in May, 1907.

The Atoka Agreement between the United States and the Choctaw and Chickasaw tribes, negotiated April 23, 1897, amended by § 29 of the Curtis Act (June 28, 1898, ch. 517, 30 Stat. 495, 505), and thereby submitted for ratification by the members of the tribes, was ratified by a majority of votes at a special election held on August 24,

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1898, the result of which was ascertained and proclaimed on August 30th by a board of commissioners for that purpose designated by the Act, and the Agreement thus became effective. (See 6th Ann. Rep. Dawes Comm., September 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, p. 9; Homer's Const. and Laws of Chickasaw Nation, 1899, p. 420.) It contains provisions respecting townsites (30 Stat. 508), of which the pertinent portions are set forth in the margin.<sup>1</sup>

Regulatory provisions, embodied in an Act of May 31,

<sup>1</sup> "TOWN SITES. It is further agreed that there shall be appointed a commission for each of the two nations. . . . Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. . . . When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. . . . If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent. of said appraised value of the lot, and shall pay the sixty-two and one-half per cent. of said appraised value into the United States Treasury. . . . All lots not so appraised shall be sold from time to time at public auction. . . ."

1900 (ch. 598; 31 Stat. 221, 237, 238), were assented to by the Choctaws and Chickasaws in the supplemental agreement (Act of July 1, 1902, ch. 1362; 32 Stat. 641, 652), and other regulations were thereby added. Authority to appraise town lots, improved or unimproved, to ascertain the ownership and value of the improvements, and to dispose of the lots in conformity to the provisions of the Agreement, was thereby conferred upon the town-site commission, subject to the supervision of the Secretary of the Interior. (See *Ross v. Stewart*, 227 U. S. 530, 534.) Their unfinished duties were devolved upon the Secretary by the Act of 1905, under whose authority the Indian Inspector acted as already shown. The Supreme Court of Oklahoma therefore was correct in holding that the findings of the Inspector respecting matters of fact, affirmed on final appeal by the Secretary, were binding upon the courts, in the absence of gross mistake or fraud (neither of which is here present), and that the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the preferential right of purchase, and ultimately issuing the patent, to the wrong party. *Johnson v. Towsley*, 13 Wall. 72, 85; *Shepley v. Cowan*, 91 U. S. 330, 340; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Gonzales v. French*, 164 U. S. 338, 342; *Ross v. Day*, 232 U. S. 110, 116.

Since the findings are to the effect that the improvements upon the lot were owned by Ellis, and by defendant in error through a purchase from him, the contentions of plaintiffs in error are reduced to these: that the decision of the Indian Inspector, approved by the Secretary of the Interior, to the effect that the Atoka Agreement terminated the relation of landlord and tenant, was based upon an erroneous construction of the Agreement, and ignored the equities of the landlord as against the tenant; that under a correct construction of the provision permitting the owner of the improvements to buy a town lot



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at a fraction of the appraised value, a tenant who wrongfully withheld possession of such a lot from his landlord, thereby preventing him from erecting improvements thereon, could not acquire title to the lot as against the landlord; and that a tenant who, under the provisions of the Agreement, but in violation of the rights of his landlord, has acquired a deed for such a lot, holds the title as trustee for the landlord.

The Atoka Agreement of course is to be read in the light of the conditions out of which it arose. The Choctaw Indians acquired the territory in question under a treaty with the United States made at Dancing Rabbit Creek in the year 1830, Sept. 27 (7 Stat. 333). In accordance with the provisions of the treaty, and pursuant to authority conferred by Act of May 28, 1830 (ch. 148, § 3, 4 Stat. 411, 412), a patent was issued by the President of the United States, March 23, 1842, granting the land to the Choctaw Nation, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it, liable to no transfer or alienation, except to the United States, or with their consent." (Durant's Const. & Laws of Choctaw Nation, 1894, p. 31.) In 1837 the Choctaws entered into a treaty with the Chickasaws, by which the latter were privileged to form a district within the limits of the Choctaw country, "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws." This received the approval of the President and Senate of the United States. January 17, 1837, 11 Stat. 573, 575. In the year 1855 a new treaty was made between the United States and these tribes (June 22, 1855, 11 Stat. 611), by which the boundaries of their country were defined and the United States guaranteed the lands embraced within the specified limits "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that

each and every member of either tribe shall have an equal, undivided interest in the whole; *Provided, however*, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." The westerly part of the country was established as a district for the Chickasaws, the easterly part for the Choctaws. After the Civil War, and in the year 1866, a new treaty was made, by the eleventh article of which it was recited that the land described in the treaty of 1855 "is now held by the members of said nations in common, under the provisions of the said treaty." April 28, 1866, 14 Stat. 769, 774. A plan for a survey, division, and allotment of the land was proposed by the same article, but this came to naught because of the non-assent of the Choctaw people. *Woodward v. deGraffenried*, 238 U. S. 284, 294. Thus matters remained until, in the course of time, the influx of white people into this and other parts of the Indian Territory created a new situation of great complexity, calling for a readjustment of the affairs of the Five Civilized Tribes. In 1893 the Dawes Commission was appointed, under authority of an act of Congress (March 3, 1893, ch. 209, § 16, 27 Stat. 612, 645), to enter into negotiations with those tribes for the purpose of extinguishing the tribal titles to lands. The annual reports of the Commission, a reference list of which is printed in 238 U. S. 296, give a complete and instructive account of its labors. The first of these reports, dated November 20, 1894, shows that among the original propositions submitted to the several tribes as a basis of negotiations it was suggested that townsites should be the subject of special agreements, such as would secure to the Indians and to investors "a just protection and adjustment of their respective rights." In explanation it was stated: "There are towns in the Territory ranging in population from a few people to 5,000 inhabitants. Nearly all of

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them are noncitizens. . . . Many large and valuable stone, brick, and wooden buildings have been erected by noncitizens of these towns, and the lots on which they stand are worth many thousands of dollars. These town sites are not susceptible of division among the Indians, and the only practicable method of adjusting the equities between the tribes who own the sites and those who constructed the buildings is to appraise the lots without the improvements and the improvements without the lots, and allow the owners of the improvements to purchase the lots at the appraised value, or to sell lot and improvements and divide the money according to the appraisalment." House Ex. Doc., Part 5, 53d Cong., 3d Sess., Vol. 14, pp. lxii, lxy.

The first agreement to be negotiated by the Commission was with the Choctaws under date December 18, 1896, but the Chickasaws refused to concur in this, and another was negotiated at Atoka, April 23, 1897, with both tribes. In its original form it is appended to the Fourth Report of the Commission, dated October 11, 1897 (House Doc. No. 5, 55th Cong., 2d Sess., Vol. 12, pp. cxvii, cxxii). It provided that a townsite commission should be appointed for each of the two nations; that each existing town site should be laid out and platted, and that "each lot, on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission . . . at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy the same at sixty-two and one-half per cent. of the said market value, within sixty days from date of notice served on him that such lot is for sale." It further provided that if the owner of the improvements should fail to purchase, the lot with improvements should be sold at auction, the

purchaser to pay the price to the owner of the improvements, less sixty-two and one-half per cent. of the appraised value of the lot, which was to be paid into the United States Treasury for the benefit of the Indians. This agreement, with some amendments, was ratified by Congress in § 29 of the Curtis Act and afterwards ratified by the voters of the two tribes, as already mentioned. The provision as to purchase of town lots was amended only by giving to the owner of the improvements the right to buy one residence and one business lot at fifty per centum, and the remainder of such improved property at sixty-two and one-half per centum, of the appraised market value.

The same Act contained, in its fifteenth section (June 28, 1898, c. 517, 30 Stat. 495, 500) a provision for the appointment of a townsite commission for each of the Chickasaw, Choctaw, Creek, and Cherokee tribes; allowing "the owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings," to deposit in the United States Treasury one-half of the appraised value of the lot excluding improvements, as a tender to the tribe of the purchase money for the lot; and permitting improved lots to be sold at auction if the owner of the improvements thereon failed to deposit the purchase-money within a limited time, in which case the purchaser at auction might by appropriate proceedings in the United States Court require the owner of the improvements to either accept their appraised value or remove the improvements from the lot. The same section provided for the sale of unimproved lots, the purchase-money to be deposited with like effect as in the case of improved lots; and authorized the tribes to make deeds to the purchasers conveying the title to such town lots, whereupon the purchase-money was to become the property of the tribe. These provisions would appear to have been superseded, as to the Choctaw and Chickasaw tribes, by their accept-

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ance of the Atoka Agreement, and are mentioned only to show that in § 15, as in the Agreement, it was the owner of the improvements, and he alone, who was recognized as entitled to be considered in the sale of the town lots.

It is not necessary to say that the Agreement, when thus ratified by Congress and by the tribes, became the law of the land, and superseded all customs, if such there were, that had sanctioned the making of leases to non-citizens. By its terms towns, so far as they had been established within the domain of the tribes, were recognized, and provision was made for platting them, and for selling the lots, both improved and unimproved, the proceeds to become the property of the tribes. It was recognized that the money expended by white men in constructing the buildings and other permanent improvements had increased the value not only of the improved lots but of all lands within the town; and hence a preferential right of purchase was conferred upon "the owner of the improvements on each lot." But there is nothing in the history of the matter, any more than in the language employed, to give the least countenance to the suggestion that prior rights of occupancy were intended to be recognized in this Agreement. Ownership of improvements actually upon the soil was adopted as the sole foundation of the newly conferred right to acquire title to the soil itself. And these improvements must be "permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses." The exclusion of these latter, indicative merely of occupancy, is highly significant.

The provisions of the Agreement respecting the sale of town lots could not be carried into effect without terminating existing rights of occupancy, if such there were, saving as these coincided with the ownership of permanent improvements. Hence, if Fitzpatrick had any right to the soil, it came to an end either when the Agreement took effect in August, 1898, or, at latest, when its townsite pro-

visions were put in operation at Chickasha. It is insisted that Ellis, as tenant, was estopped to deny his landlord's title, and that Riddle is in no better case. *Blight's Lessee v. Rochester*, 7 Wheat. 535, 547. But a tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law. *England v. Slade*, 4 T. R. 682; *Blake v. Foster*, 8 T. R. 487; *Neave v. Moss*, 1 Bing. 360; *Hopcraft v. Keys*, 9 Bing. 613; *Doe d. Higginbotham v. Barton*, 11 Ad. & El. 307; *Den ex dem. Howell v. Ashmore*, 22 N. J. L. 261, 265; *Shields v. Lozear*, 34 N. J. L. 496, 500; *Hilbourn v. Fogg*, 99 Massachusetts, 11; *Lamson v. Clarkson*, 113 Massachusetts, 348.

The argument that Ellis, by withholding possession of the lot from Fitzpatrick, prevented him from erecting improvements such as would have satisfied the requirements of the Atoka Agreement so as to confer upon Fitzpatrick the preferential right to purchase the lot, and hence that Ellis and those claiming under him are estopped to purchase the land for themselves and must be held to have acquired it in trust for Fitzpatrick and those claiming under him, cannot prevail. The facts do not show that Ellis' refusal to pay rent, and his resistance to the forcible entry and detainer suit, were other than *bona fide*. Nor does it appear that Fitzpatrick, even before the Atoka Agreement, had any right of possession of the land as against the Indians. So far as the facts appear, he had no rights at all, except as against the tenant, and against him only because of the estoppel. In order to show that the tenant, by withholding possession, deprived the landlord of the opportunity of exercising a valuable right, it must be made to appear that, with the tenant out of the way, the right would have existed. But, if Ellis had given up possession, Fitzpatrick would have had no more right than any other white man to enter and erect improvements—that is to say, none at all. At most, he would have had a mere opportunity, without right,

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and the deprivation of this cannot furnish a foundation for impressing a trust upon the title afterwards acquired by Ellis' grantee by direct purchase from the owners of the paramount title. Even were it made to appear that there was error in adjudging the title to the patentee, this would not raise a trust in favor of the contestant unless he could show that by the law, properly administered, the title ought to have been awarded to him. *Bohall v. Dilla*, 114 U. S. 47, 51; *Sparks v. Pierce*, 115 U. S. 408, 413.

What, then, was the nature of Fitzpatrick's equity? Under the facts found, both he and Ellis were trespassers upon the lands of the Indians, in disregard of rights secured to the latter by treaty with the United States, and in violation of § 2118, Rev. Stat. The lease created a mere estoppel between trespassers. The rights, if they may be called rights, of lessor and lessee alike were terminated by the force of the Agreement. Individual ownership of the land originated with that instrument, and can be only such as by its terms were created. It was competent for Congress, or for the Indian tribes, with the concurrence of Congress, to deal as they deemed proper with the practical situation resulting from the building of towns by white men within their borders. They chose to confer a preferential right of purchase, at a discount from the appraised value, not upon the "occupant," or "possessor," or "landlord," or "tenant," but upon "the owner of the improvements" other than those of a temporary nature. This did not cut off any pertinent equity, but it rendered all equities impertinent except such as related to the ownership of the improvements.

The Atoka Agreement, while accepting existing improvements of a substantial nature as part consideration for the purchase of town lots, contained no recognition of legitimacy in the previous occupation of the soil by white men, nor any official ratification of their intrusion upon the Indian lands. It laid aside, as immaterial, the question

whether improvements had been constructed with or without rightful possession of the land. In this respect it differed from the Original Creek Agreement of March 8, 1900 (Act of March 1, 1901, ch. 676; 31 Stat. 861, 866), the proposed Cherokee agreement of April 9, 1900 (Act of March 1, 1901, ch. 675; 31 Stat. 848, 853), which failed of ratification by the tribe (8th Ann. Rep. Dawes Comm., Oct. 1, 1901; House Doc. No. 5, 57th Cong., 1st Sess., Vol. 24, p. 11), and the Cherokee agreement of July 1, 1902 (ch. 1375; 32 Stat. 716, 723), which was ratified by the tribe (10th Ann. Rep. Dawes Comm., Sept. 30, 1903; House Doc. No. 5, 58th Cong., 2d Sess., Vol. 20, p. 115).

If Fitzpatrick had had any equitable right or interest in the improvements upon the lot in controversy, a very different question would be presented. But he had none.

We are referred to two decisions of the United States Court of Appeals for the Indian Territory that are said to uphold the legal validity of grants of leasehold interests in lands in the Choctaw and Chickasaw country prior to the Atoka Agreement. *Kelly v. Johnson* (1897), 1 Ind. Ter. 184, 189; 39 S. W. Rep. 352, 354; *G. W. Walker Trading Co. v. Grady Trading Co.* (1897), 1 Ind. Ter. 191, 196-198; 39 S. W. Rep. 354, 356. These cases, however, go no further than to hold that a possessory right might pass by transfer from a citizen of one of the Indian tribes to a non-citizen, and would protect the latter against forcible entry by others not showing a better right to the possession, nor acting under authority of the tribe, and that a lease of such lands with improvements estopped the lessee to question the lessor's title. See, also, *Wilson v. Owens* (1897), 1 Ind. Ter. 163; 38 S. W. Rep. 976; affirmed, 86 Fed. Rep. 571; *Hockett v. Alston*, 110 Fed. Rep. 910, reversing S. C., 3 Ind. Ter. 432; 58 S. W. Rep. 675; *Williams v. Works*, 4 Ind. Ter. 587; 76 S. W. Rep. 246; *Fraer v. Washington*, 125 Fed. Rep. 280. These decisions leave untouched the authority of Congress, with



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or without the consent of the tribe, to terminate all possessory interests and dispose of the fee in any manner deemed proper.

Much reliance is placed upon the decision of this court in *Rector v. Gibbon*, 111 U. S. 276, which turned upon the effect of an act of Congress in relation to the Hot Springs Reservation in the State of Arkansas (Act of March 3, 1877, ch. 108; 19 Stat. 377). The statute was passed to relieve the peculiar hardship resulting from a decision of the Court of Claims, affirmed by this court (*Hot Springs Cases*, 92 U. S. 698, 713, 715, 716), holding invalid, for reasons more or less technical, certain land titles set up against the United States, some of them under claims of preëmption and one under a New Madrid location, followed in each case by long years of possession. *Rector v. Gibbon* construed the legislation in the light of the circumstances out of which it arose, and so as to relieve those who had made improvements or claimed possession under the titles that had been found defective. It has no proper bearing upon the questions presented in the case at bar. *Lamb v. Davenport*, 18 Wall. 307; *Atherton v. Fowler*, 96 U. S. 513; and *Trenouth v. San Francisco*, 100 U. S. 251; cited by plaintiffs in error, are likewise aside from the point.

It is, perhaps, unnecessary to mention that the matter at issue here is not concluded by the decision in *Ellis v. Fitzpatrick*, 3 Ind. Ter. 656; 64 S. W. Rep. 567; *S. C.*, affirmed 118 Fed. Rep. 430; 55 C. C. A. 260; for that case concerned only the right of possession as between landlord and tenant, and Ellis' ownership of the improvements was admitted in the pleadings. The legal or equitable title to the soil was not involved.

From the views above expressed, it results that the judgment of the Supreme Court of Oklahoma must be

*Affirmed.*